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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

⁷⁵
No. 383

THE JAMES CLARK DISTILLING COMPANY,
APPELLANT,

VS.

THE WESTERN MARYLAND RAILWAY COMPANY
AND THE STATE OF WEST VIRGINIA,
APPELLEE.

⁷⁶
No. 384

THE JAMES CLARK DISTILLING COMPANY,
APPELLANT,

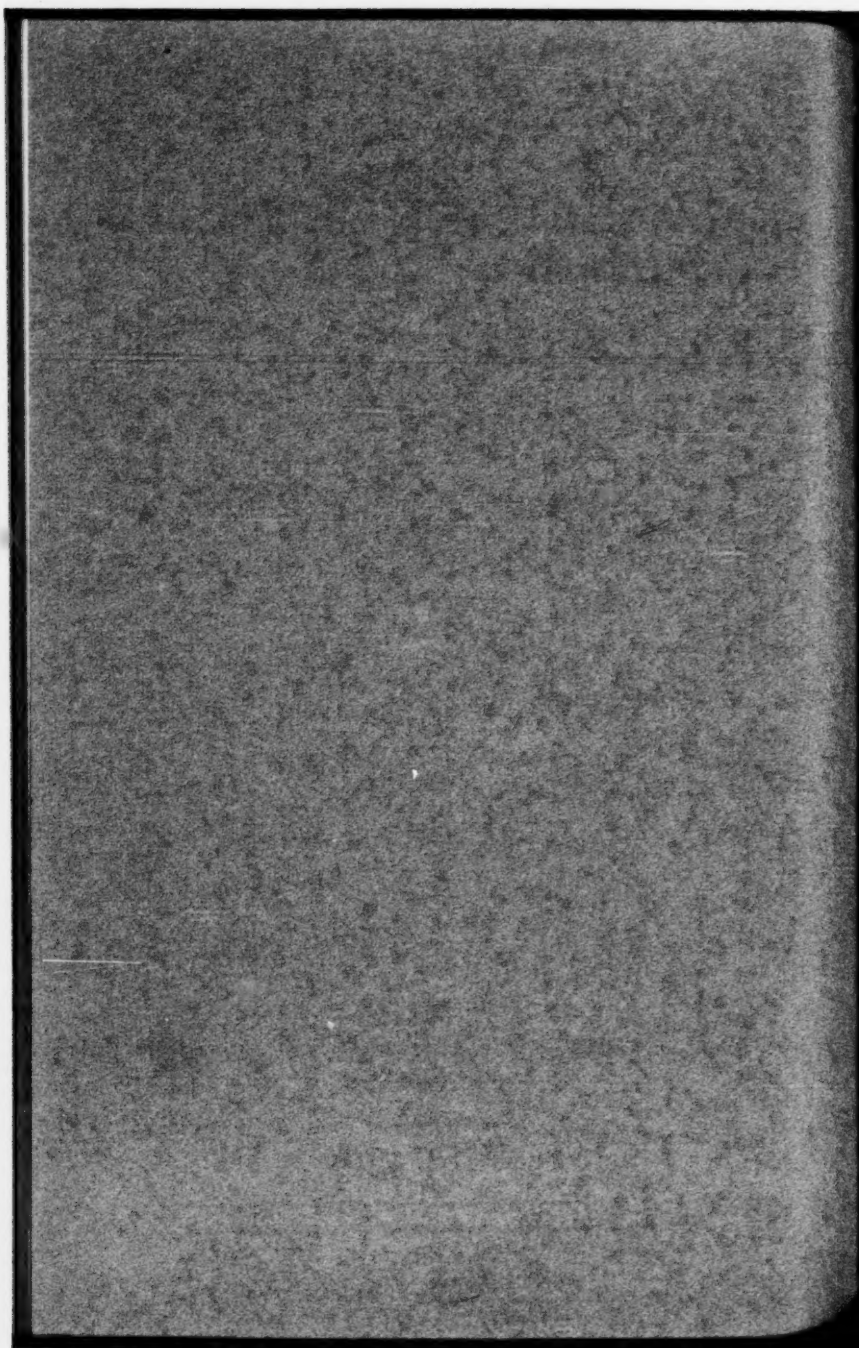
VS.

THE AMERICAN EXPRESS COMPANY AND THE
STATE OF WEST VIRGINIA,
APPELLEE.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MARYLAND.

BRIEF FOR THE STATE OF WEST VIRGINIA,
APPELLEE.

W. B. WHEELER,
Of Counsel for the State of West Virginia.



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NOS. 383-384.

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Appellant.

vs.

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Appellees.

THE JAMES CLARK DISTILLING CO.,
Appellant.

vs.

THE AMERICAN EXPRESS CO. AND THE STATE
OF WEST VIRGINIA

Appellees.

Brief for the State of West Virginia.

STATEMENT OF THE CASE

These cases were heard in the October term, 1914, along with the case of the Adams Express Co. v. The Commonwealth of Kentucky. They were re-docketed for hearing without any motion for re-hearing having been filed. The court did not indicate any particular point on which the cases were to be re-argued. They will be briefed therefore as for an original hearing.

The construction of the West Virginia law and the state prohibition amendment of West Virginia have been fully discussed in a very able brief by Honorable Fred O. Blue, State tax and prohibition commissioner of West Virginia. In the brief which we submit

* Blackface and capitals in this brief supplied.

herewith we confine ourselves to two propositions which are involved in this case.

First, Is the Webb-Kenyon law constitutional?

Second, Has the State of West Virginia the authority to enact the legislation involved, to-wit:

To prohibit the possession and receipt of intoxicating liquor for beverage purposes, from a common carrier.

CONSTITUTIONALITY OF WEBB-KENYON LAW

I

POWER OF CONGRESS TO ENACT LAWS REGULATING INTERSTATE COMMERCE IN INTOXICATING LIQUORS.

Article 1. Section 8, clauses 3 and 18, set forth the power of Congress to enact laws regulating interstate commerce. They read as follows:

"To regulate commerce with foreign nations, among the several States, and with the Indian tribes."

"To make all laws which shall be necessary and proper for carrying into execution the power given."

THE WEBB-KENYON LAW IS AUTHORIZED BY THE FEDERAL CONSTITUTION.

The Webb-Kenyon law has been sustained by five courts of last resort since the last hearing on these cases. The validity of the law or its application to the facts have been considered in many courts. In three instances the courts did not pass directly upon the constitutionality of the law. The Court of Appeals in Kentucky, 154 Kentucky 462, held that the facts did not constitute a violation of a valid state law. The Supreme Courts of Tennessee and Delaware reached a similar conclusion in the cases before them, namely, that the shipments were for a lawful purpose and therefore did not come under the provisions of the Webb-Kenyon law. In no case has a Court of last resort held that the Webb-Kenyon law was unconstitutional. On the other hand this law has been declared con-

stitutional and valid by every State Supreme Court, the United States Circuit Court of Appeals and all of the upper courts in the State and Federal government which have passed upon its constitutionality.

Glen vs. Southern Exp. Co. N. C., decided Dec. 1, 1915.

Southern Express Co. v. State, 66 So. Rep. 115.

Southern Express Co. v. Whittle (Ala.) 6950 South Rep. 652.

West Va. v. Adams Ex. Co. (C. C. A.) 219 Fed. 794.

State v. S. A. L. R'way (N. C.) 84 S. 283.

State v. Doe (Kansas) 139 Pac. 1169.

Kans. vs. Mo. Pac. Ry.

State v. Express Co. (La.) 145, 451.

Sou. Express Co. v. Beer (Miss.) 65 South 575.

United States v. Oregon & W. R. & N. Co. 210 Fed. 378.

Atkinson v. Sou. Ex. Co. 945 C. 444, 78 S. E. 516
45 L. R. A. (N. S.) 349.

Van Winkle v. Delaware, 91 Atl. 385.

Gottstem v. Washington, decided December 12, 1912.

Tailor vs. Commonwealth, 85 S. E. Rep. 499.

The court of last resort in Kentucky on November 4, 1915, in the last case before it, Adams Express Company v. Com. (Ky), 169 S. W. 603, held:

"The Webb-Kenyon Act puts beyond the protection afforded interstate commerce any intoxicating liquor shipped into the state to be sold or in any manner used, in violation of the laws of the state."

The court cited most of the above cases as authority for their decision.

This court in the recent case of Adams Express Company v. Kentucky, October term, 1914, said:

"The Constitution of the United States grants to Congress authority to regulate commerce among the States to the exclusion of State control over the subject. This power is comprehensive, and subject to no limitations, except such as are found in the

Constitution itself. * * * Before the passage of the Webb-Kenyon Act, while the state in the exercise of its police power might regulate the liquor traffic after the delivery of the liquor transported in interstate commerce, there is nothing in the Wilson Act to prevent shipment of liquor in interstate commerce for the use of the consignee provided he did not undertake to sell it in violation of the laws of the state. The history of the Webb-Kenyon act shows that Congress deemed this situation one requiring further legislation upon its part, and thereupon undertook in the passage of that Act, to deal further with the subject, and to extend the prohibitions against the introduction of liquors into the State by means of interstate commerce."

This Court has repeatedly held in an unbroken line of decisions from *Gibbons v. Ogden*, 9 Wheaton, page 1, down to the last case before this Court, involving this question that there is no limitation on Congress in regulating interstate commerce except what is found in the Constitution itself. There is no provision in the Constitution which prohibits Congress from enacting a measure like the Webb-Kenyon law.

THE LAW IN QUESTION IS NOT A DELEGATION OF LEGISLATIVE POWER

It is the theory of those who oppose this law, that Congress has delegated some power to the State to regulate interstate commerce. Under the plenary power of Congress to regulate interstate commerce, this law provides that the protection of interstate commerce shall be denied to intoxicating liquors which are shipped from one State to another when such liquors are to be received, or possessed, or used in violation of the State law. This is not a delegation of power, it is an absolute exercise of the power of Congress. It does not prohibit all liquors from the channels of interstate commerce, but simply those which are transported, received, possessed or used in violation of the laws of the State. If it be conceded that all

liquors may be denied the privilege of interstate commerce, then it follows that the shipment of these which are in violation of the law, may be denied the privilege of interstate commerce.

An illuminating discussion on this point is found in the decision of the Supreme Court of Iowa, *State vs. U. S. Express Company*, 145 N. W. Rep. 351:

"There are no words of delegation in the act itself, and the theory of it is that liquors intended for use, contrary to State rules, should be an outlaw of interstate commerce, and neither the shipper nor the carrier may say that the State is interfering with interstate commerce, for the reason that **right of such shipments between the States is denied by Federal legislation.** It is true that the effect of the act is to give the States more power, but there is no such express delegation and the language of the act is in no sense permissive. The act is prohibitory in character and acts not upon States but upon articles of commerce. Interstate commerce in these things is prohibited under certain conditions, and, as we shall presently see, the act is uniform in its operation.

"This is not the case of a law enacted in the unauthorized exercise of a power exclusively confined to Congress, but of a law which it was competent for the State to pass, but which could not operate upon articles occupying a certain situation until the passage of the act of Congress. That act in terms removed the obstacle and we perceive no adequate ground for adjudging that a re-enactment of the State law was required before it could have the effect upon imported which it has already had upon domestic property. Jurisdiction attached, not in virtue of the law of Congress, but because the effect of the latter was to place the property where jurisdiction could attach.

"Congress may say the power to engage in interstate or international commerce shall not be understood as permitting anybody to sell opium or intoxicating liquors to anyone else, and that they shall be excluded altogether from the domain of interstate commerce. That Congress has a right to

say * * * That is not a question of delegated power. It is not a question of permission to the State. It is a question of the right of Congress to prescribe what shall be the limit of interstate commerce."

See also cases cited *supra*.

Congress does not delegate power to the states to regulate interstate commerce, but Congress itself prohibits the facilities of interstate commerce to all liquors outlawed in the states under the police power. It was decided in *Hill vs. Hesterberg*, 184 N. Y. 126 at 132:

"That Congress can authorize an exercise of police power by a State, which without such authority would be an unconstitutional interference with commerce has been expressly decided by the Supreme Court of the United States in *Re Rahrer* 140 U. S. 545."

Congress released its control over liquor shipped by interstate commerce under the Wilson Law upon arrival. This gave the States some relief in the enforcement of their laws. The Webb-Kenyon Act goes one step further and prohibits all shipments of liquor into a State for a purpose prohibited by State law. In neither case is there a delegation of power, but there is a proper use of power concurrently by the State and Federal governments within their respective jurisdictions in dealing with a recognized evil.

CONGRESS HAS POWER TO ELIMINATE DETRIMENTAL COMMODITIES FROM INTER-STATE COMMERCE

It is a mooted question how far Congress may go in regulating or removing useful commodities from the channels of interstate commerce, but there is ample authority for the proposition that any article of commerce which is detrimental to public morals may be eliminated from commerce entirely.

The Supreme Court recognized this principle of legislation when it upheld the action of Congress forbidding the

interstate traffic in lottery tickets in the following language, 188 U. S. 356:

"We have said that the carrying from State to State of lottery tickets constitutes interstate commerce, and that the regulation of such commerce is within the power of Congress under the Constitution. Are we prepared to say that a provision which is in effect a prohibition of the carriage of such articles from State to State is not a fit or appropriate mode of regulation of that particular kind of commerce? * * * In determining whether regulations may not under some circumstances properly take the form of or have the effect of prohibition, the nature of the interstate traffic which it has sought to suppress cannot be overlooked.* * * But surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the States an element that will be confessedly injurious to public morals. * * * In legislation upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States—perhaps all of them—which for the protection of public morals prohibited the drawing of lottery tickets, as well as the sale or circulation of lottery tickets, within their respective limits. It is said, in effect, that it would not permit the declared policy of the States which sought to protect their people against the mischiefs of the lottery business to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce.

"If the carrying of lottery tickets from one State to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offense to cause lottery tickets to be carried from one state to another,

"The title is—'An Act divesting intoxicating liquors of their interstate character in certain cases.'

*** Congress has, therefore, undertaken to divest of its interstate character all intoxicating liquor shipped into a State to be used for an unlawful purpose—that is, for a purpose made unlawful by any law of such State. When the law of a given State makes it a crime to sell intoxicating liquor, Congress intends that any liquor shipped in for the purpose of violating such statute shall be divested of its interstate character and that all the protection incident to such character shall be removed from it.

"This brings us to the vital question on which will hang all the law of the prophets of this conviction, namely; whether the power granted to Congress by the Constitution to regulate interstate commerce includes the authority thus to divest a given commodity of its interstate character.

"In considering this most important and far-reaching problem it is one thing to regard its solution as a logical deduction to be drawn mechanically from the language of the Constitution and another thing to account this a serious, deliberate attempt by the law-making power of the nation to obey the very spirit of the Constitution itself framed for the professed purpose of insuring domestic tranquility and promoting the general welfare. The citizen, who driving close to the brink, passes the danger line and finds himself in the wrecked condition brought about by transgressing the law, will search with eagerness for some solace and protection in the great fundamental charter whence the body which enacted the law derived its power. Under these circumstances the searcher asserts with vehemence the rights of the individual as against the assumed corrective power of the State itself, and the immortal blessings of personal liberty find no greater champions or more eloquent eulogists than those who are accused of violating statutes prescribed for the government of their conduct. It may be said, however, that constitutions are not framed and adopted for the special benefit of those who disregard or stretch to the breaking enactments intended for the enhancement of the public peace and welfare, but for the good of the citizenship at large, and the protection of higher

things of real value to humanity which make life worth living. **Civil conditions cannot remain stationary and unless they retrograde they must advance,** and when the law-making power of the nation upon serious thought and careful deliberation, enacts a statute manifestly and unmistakably intended to promote the public health and morals and happiness it must be presumed, until the contrary is clearly shown, that it acted within its lawful province and power. Let us see, then, whether liquors shipped into a state for the purpose of violating its statutes can be divested of their interstate character in the exercise of Congress of its power to regulate interstate commerce. * * *

"In construing the Constitution the very proper and indeed absolutely necessary principle has been followed that that instrument was intended to endure for all time and that its grants of power are, therefore, to be interpreted as applicable to new conditions as they arise. By this is not meant, however, that these new conditions shall in any case justify the exercise of a power not granted, or create a limitation not imposed by the Constitution, but that the powers which are granted shall, if possible, be made applicable to those new conditions.

"As said by a brilliant and well-known member of the legal profession:

"* * * The Constitution our fathers made had the marching quality in it; * * *"

"It has been supposed by some students of our national history that a written constitution is an inert mass of tabulated provisions. The supposition is not correct; **for the national Constitution, under the guidance of our great court of last resort, has grown and developed, not perhaps like an unwritten one, but still keeping abreast with the demands of 'progressing history.'** This does not mean that a written Constitution grows by being violated whenever its provisions stand in the way of national progress; but it does mean that our Constitution was, by the enlightened foresight of its framers, made to be an intelligent guide and chart, not a mere list of obstacles. (George R. Peck, Reports of American Bar Association, 1900, Vol. 23, pages 256 and 275.)

"We now see the great end which they proposed to accomplish. It was to frame, for the consideration of their constituents, one Federal and national Constitution—a Constitution that would produce the advantages of good, and prevent the inconvenience of bad government—a Constitution whose beneficence and energy would pervade the whole Union, and bind and embrace the interests of every party, a Constitution that would insure peace, freedom and happiness, to the States and people of America." (Lectures of James Wilson, Vol. 1, p. 542.) "Although Congress cannot authorize a State to legislate, it may adopt State legislation; it may divest designated articles of their interstate commerce character and subject them to the operation of State laws * * *." (Sutherland's Notes on United States Constitution, p. 79.)

"That the power to regulate includes the power to prohibit the interstate transportation of at least certain classes of commodities has been placed beyond question by the decision of the court in *Champion v. Ames*." (188 U. S. 321.) (Willoughby on the Constitution, Vol. 2, Sec. 347.)

"A writer of great legal experience and ability, in speaking of the power of Congress to regulate commerce, said: 'Having ascertained, then, what commerce is, and what are some of its elements, which may be the subject of the action of Congress, or of the attempted action of the States, we next come to consider what it is to regulate commerce. * * * Commerce being intercourse and traffic between people, to regulate it is to prescribe rules by which it shall be conducted.' (Miller on the Constitution, p. 449.)

"In *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, Mr. Justice Field in delivering the unanimous opinion of the court, said (p. 203):

"Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce as well as commerce with foreign nations vested in Congress is the power to prescribe the rules by which it shall be governed, that is the conditions upon which it

shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged.' At page 215, the court quotes with approval from Judge Cooley, (Cooley's Constitutional Limitations, 732), to the effect that Congress may descend to the most minute directions of interstate commerce and may establish police regulations as well as the States, confining their operations to the subjects over which it is given control by the Constitution.

"In *United States v. Gettysburg Electric Ry. Co.* 160 U. S. 668, the act of August 1, 1888.

"'An act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country, and to quicken and strengthen his motives to defend them, and which is germane to, and intimately connected with, and appropriate to, the exercise of some one or all of the powers granted by Congress, must be valid.' (p. 429.)

"Again:

"'Can it not erect the monuments provided for by these acts of Congress, or even take possession of the field of the battle, in the name and for the benefit of all the citizens of the country for the present and for the future? Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country. * * * No narrow view of the character of this proposed use should be taken. Its national character and importance, we think, are plain. The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and any inference from them all may be drawn that the power claimed has been conferred.' (p. 430.) * * * 'For it is of as much national importance to make men sober as to make them patriotic.' In the case of *In Re Rahrer*, 140 U. S. 545, holding constitutional the Wilson bill which removed from interstate shipments

is it logically inconsistent with plenary power to regulate the traffic in such commodity between the States, because it is now the settled doctrine of the Federal courts that interstate commerce is a subject on which primarily Congress alone may legislate and of which it alone has jurisdiction and concerning which the State may not assume to act except incidentally whether Congress sees fit to act or not. The inevitable corollary of this doctrine is that Congress possesses over this subject power so ample and so complete that it may well remove from a commodity otherwise legitimate its interstate character and protection whenever its movement in interstate commerce is for the accomplishment of an unlawful purpose—the violation of the laws of one of the sister States of the Union. Those who contend for the invalidity of the act must base their reasoning on the slender platform that intoxicating liquor when transported for the purpose of violating a State statute is by some subtle constitutional alchemy of the same national importance and entitled to the same governmental protection as if it were brought into the State for the most beneficent purpose imaginable. We deem this line of argument and the conclusion resulting therefrom opposed to the true doctrine of constitutional interpretation and to the spirit expressed by the framers of the Constitution when the preamble was formulated."

ALCOHOL OR INTOXICATING LIQUOR USED AS A BEVERAGE IS A DELETERIOUS COMMODITY AND MAY BE EXCLUDED FROM INTERSTATE COMMERCE.

Science has demonstrated and governments of the world have officially recognized these facts about intoxicating liquor.

Alcohol, or intoxicating liquor, is a poison to all life, plant and animal.

At the International Congress on Alcoholism in London in 1909 where many well-recognized and well-known scientific men and medical leaders from all the great nations were in attendance, the following statement defining the

nature of alcohol was drafted and signed by large numbers of these leaders:

"Exact laboratory, clinical and pathological research has demonstrated that alcohol is a dehydrating protoplasmic poison, and its use as a beverage is destructive and degenerating to the human organism. Its effect upon the cells and tissues of the body are depressive, narcotic and anaesthetic. Therefore, therapeutically its use should be limited and restricted in the same way as the use of other poisonous drugs."

The committee of fifty-one which determines what drugs and narcotics shall be recognized as medicine in the United States Pharmacopoeia have decided, beginning with January, 1916, whisky and brandy shall no longer officially be recognized as a medicine in the United States Pharmacopoeia. These cold-blooded scientists have reached the conclusion that even as a stimulant for medical purposes, it is a failure. The after-effects are so deleterious that other stimulants which are not followed by these evil results should be substituted.

Alcohol penetrates the nerve fibers like chloroform and is a deceptive, habit-forming drug, injuring the drinker and those dependent upon him for support.

This court said in the case of *Crowley v. Christensen*, 137 U. S. 86:

"There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true, falls upon him in his health, which the habit undermines; in his morals, which it weakens, and in the abasement which it creates, but as it leads to neglect of business and waste of property and general demoralization, it affects those who are immediately connected with and dependent upon him."

See *Mugler v. Kansas*, 123 U. S. 623:

"But surely it will not be said to be a part of anyone's liberty, as recognized by the Supreme Court

times as much in free drinkers and three to fifteen times as much in excessive drinkers compared with abstainers."

Insurance companies give us indisputable facts that the use of liquor shortens the drinker's life. Arthur Hunter, Chairman of the Central Bureau Medico-Actuarial Mortality Investigation, December, 1914, reported statistics gathered from two million lives. It showed that among the men, whose habits were considered satisfactory, but were drinkers of alcoholic liquors, the death rate was fifteen to a thousand, where the death rate would only have been ten had alcoholic liquors not been used. He also stated that the data gathered from these two million lives showed men whose average age was 35, would as total abstainers have an expectancy of life for 32 years more, but the liquor habit had caused a deduction of more than four years.

In *State v. Kansas*, 80 Pacific, at page 989, the court says:

"The commodity in controversy is intoxicating liquors. * * * but the article is one whose moderate use, even, is taken into account by actuaries of the insurance companies, and which bars employment in classes of service involving prudent and careful conduct, an article conceded to be fraught with such contagious peril to society that it occupies a different status before the Courts and the Legislature from other kinds of business."

The Mortality Statistics published by the Census Bureau of this Government clearly demonstrate the deleterious character of the commodity in question and the necessity for Federal legislation, which will safeguard and protect our people from the evil effects arising from the use of intoxicating liquors.

It is a fact within the common knowledge of all that the male population is more addicted to the use of intoxicating liquors than the female population. The result of this use of intoxicating liquors of the male population in excess of the use thereof by females is written by the hand of death in our Mortality Statistics.

While the male and female population are practically the same, the number of deaths of the two divisions are widely different, and this difference is becoming greater and greater as the years go by.

In order that the Court may fully understand the serious consequences resulting from the use of intoxicating liquors by our people, we attach a table taken from the Mortality Statistics, published by the Census Bureau for the years 1906, 1908, 1910, 1912 and 1913, being the last year for which we could obtain these figures showing the number of deaths of males and females, and total number of deaths within the registration area of the United States for the respective years. This area has been considerably increased during this period of time. It will therefore be necessary to take the per cent of increase in order to make a proper comparison.

We have selected nine of the causes of death in which the use of intoxicating liquors, according to the most modern medical testimony, contributes most largely, to-wit:

Alcoholism, homicide, suicide, paralysis of insane, cirrhosis of liver, venereal diseases, angina pectoris, ulcer of the stomach and epilepsy.

We have given these in the order in which they are affected by the use of intoxicating liquors, beginning with alcoholism, the most potent cause of those named.

We herewith attach table No. 2, giving the number of deaths in the registration area for the years 1906 and 1913, for these nine causes, by sex.

We also attach table No. 3 giving the total number of deaths for these nine causes by sex for the years 1906, 1908, 1910, 1912 and 1913, together with the per cent of gain for each of these years over the preceding year given.

From these tables it will be observed that the increase in the number of deaths reported in 1913 over 1906 for males was 36.2 per cent. This included, of course, the increase in population as well as the increase by addition of new territory added to the registration area.

While this increase was 36.2 per cent for the male population, the female population for the same period and in the same registration area only increased 34.6 per cent, but for the same period of time for the nine diseases named, the increase for the male was 68.9 per cent, or 32.7 per cent excess of the increase of the male deaths for all causes; the female deaths for the same causes for said period increased 52.7 per cent, or 18.1 per cent in excess of the gain per cent of deaths for all causes during said period in the registration district.

When to these nine causes we add the other causes of death unto which the use of intoxicating liquors is a large contributing factor, for instance, typhoid fever, pneumonia, diseases of the heart and arteries, etc., we can then realize why it is that in the year 1913, the death rate in the registration area of the United States was 87,408 more males than females.

As this area included a little less than two-thirds of the population of the United States, it is evident that there were between 130,000 and 140,000 more males died in this nation in that year than females, and this difference is largely caused by the use of intoxicating liquors. Not only is this enormous excess of death of males over that of females confronting us as a people, but that it is increasing at a much greater rate than the increase of population.

Old Mother Nature is rebelling as she always does, and through the Mortality Statistics of our government she is calling with pathetic eloquence for a remedy that will eliminate and eradicate this evil from among our people.

The National Congress has heard this call. She has answered it in part with the legislation now in question. It is now for the Judicial Department of this Government to place the seal of its judicial approval upon this step of progress that will assist in at least minimizing this evil.

TABLE NO. 1

	Males	Females	Total
1906	358,286	299,819	658,105
1908	375,497	316,077	691,574
1910	439,757	365,655	805,412
1912	459,112	379,139	838,251
1913	489,128	401,720	890,848
Per ct. gain from 1906 to 1913	36.2	34.6	35.4

TABLE NO. 2

	1906		1913	
	Males	Females	Males	Females
Alcoholism	2,390	317	3,326	418
Homicide	1,047	454	3,690	877
Suicide	4,521	1,332	7,709	2,279
Paralysis of insane	1,948	961	3,208	1,163
Cirrhosis of liver	4,036	2,043	5,788	2,709
Venereal diseases	1,266	810	2,869	1,720
Angina pectoris	1,640	1,110	2,878	1,714
Ulcer of stomach	731	692	1,483	1,053
Epilepsy	1,040	823	1,523	1,109
Per cent gain			68.9	52.7

TABLE NO. 3

	Males	Per cent Gain	Females	Per cent Gain
1906	19,219		8,542	
1908	22,324	16.7	9,342	9.4
1910	25,930	15.7	10,768	15.3
1912	29,876	15.2	12,270	13.9
1913	32,474	8.7	13,042	6.3

CONGRESS MAY DO LESS THAN ENTIRELY PROHIBIT THE TRAFFIC IN INTOXICATING LIQUORS THROUGH INTERSTATE COMMERCE.

If Congress has power to prohibit entirely the traffic in intoxicating liquors from interstate commerce, it naturally follows that the larger power includes the lesser.

The States have power to entirely prohibit the liquor traffic, but this does not prevent them from prohibiting the traffic in part. This principle was laid down in the case of

Ohio ex rel Dollison 194 U. S. 445 and in Rippey v. Texas, 193 U. S. 504, where the court said:

"But the State has power to prohibit the sale of intoxicating liquor altogether, if it sees fit. * * * That being so, it has power to prohibit it conditionally. It is true the greater does not always include the less. * * * In general the rule holds good, it does here."

In discussing this question, the Supreme Court of Alabama, in *Sou. Ex. Co. vs. State*, 66 Southern 122, said:

"While intoxicating liquor is property and an object of constant commerce, it is, as we have already said, an article which is made the subject of some kind of police regulation in every State of the Union. These police regulations are not, it is true, uniform in the various States, but all the States have them. There is, therefore, a field for the operation of the Webb-Kenyon law in every State of the Union; and if the Federal Constitution, under which the government was established and which, to use the language of the Supreme Court of the United States in the *Legal Tender* cases, 110 U.S. 241, 14 Sup. Ct. 122, 28 L. Ed. 204, was 'intended to endure for ages and to be adapted to the various crises of human affairs, and not to be interpreted, with the strictness of a private contract,' then it would seem that, in adopting the Webb bill, Congress was exercising, not an implied, but an express power conferred upon it by the Constitution."

And on page 124 of the same opinion:

"The power to control includes the power to limit. Congress in the Webb law, has simply placed a limitation upon commerce insofar as intoxicating liquors are concerned, and as a part of such limitations requires common carriers to refuse to accept, for transportation, or to deliver to the consignee that which is 'forbidden commerce.'"

In the case of *American Express Company vs. Beer*, 65 Sou., on page 581, the court said:

"* * * A power to wholly exclude a commodity from interstate commerce necessarily embraces within it the power to exclude it partially or when certain

conditions exist. *Wickersham vs. Rahrer*, 140 U. S. 545; 11 Sup. Ct. 865; 35 L. Ed. 572. Therefore it seems clear that Congress was well within its power in declaring it would be unlawful to transport into a State intoxicating liquor that is intended by any person interested therein to be received, possessed, sold, or in any manner used * * * in violation of any laws of such state," and on page 582 we find:

"It is true, that misery, pauperism and crime largely 'have their origin in the use or abuse of ardent spirits, * * * that the public health, the public morals, and the public safety ~~may~~ be endangered by the general use of intoxicating drink, * * * that the idleness, disorder, pauperism and crime existing in this country are, in some degree at least, traceable to this evil,' and since 'there is no inherent right in a citizen to sell intoxicating liquors,' it not being 'a privilege of a citizen of the State or a citizen of the United States,' it would seem that the power of Congress to declare that it is not a legitimate subject of interstate commerce is beyond question."

In the case of *State vs. U. S. Express Company*, 145 N. W., on page 458, the Iowa court said:

"There can be no doubt that Congress, in virtue of its power over interstate commerce might, in its discretion, put its ban upon all transportation of liquors in interstate shipment, just as it has done with lottery tickets, the shipment of liquor to Indians, the method of shipment by express companies, the shipment of game, the carriage of infected live stock, the white slave traffic, etc. All of these and other like acts were passed to aid States which came within these provisions in the enforcement of local laws which they deemed of vital importance to their citizens; in other words, to aid them in the enforcement of their police regulations. The act simply removes the bar theretofore existing to the enforcement of police regulations, because of the interstate character of the transaction and, if it be within the power of Congress to forbid the shipment of all liquors in interstate traffic, no logical reason is perceived why it may not do less, and forbid the shipment under certain conditions."

In the case of *State vs. Doe*, 139 Pac., on page 1170, the Supreme Court of Kansas said:

"Intoxicating liquors belong to a class of commodities which may be made contraband at the will of Congress. Congress might, if it chose, altogether prohibit the transportation of such liquors in interstate commerce by placing them in the same category with lottery tickets, obscene literature, adulterated foods and drugs, diseased animals, and women and girls going from one State to another for immoral purposes. * * * The plenary power of Congress includes the lesser power to permit interstate commerce in intoxicating liquors so far and under such conditions as Congress may determine."

Those who oppose this legislation ought not to complain because Congress is not exercising all of its power. Congress has prohibited through interstate commerce, simply the outlawed traffic in the State. Such action on the part of Congress is not only reasonable but necessary, if the laws are to be enforced. To deny the States this right, would necessitate the prohibition of all traffic in liquor from the privileges of interstate commerce, and the second condition would be infinitely worse for the liquor interests and would be of no particular benefit to those who are seeking only to protect dry territory from the out-lawry of liquor dealers in other States, and are now using interstate commerce as a weapon to destroy law and order in communities where the people are making an honest effort to maintain it.

**THE FEDERAL CONSTITUTION GIVES NO GUAR-
ANTY TO A CITIZEN TO RECEIVE AND
POSSESS INTOXICATING LIQUOR FOR HIS
OWN USE.**

Unless there is found in the Constitution of the State some provision guaranteeing to an individual the right to receive or possess liquor for his own use, such right is not guaranteed by any provision of the Federal Constitution.

The case of *Mugler v. Kansas*, 123 U. S. 623, in which the opinion, written by Justice Harlan completely answers and refutes all arguments advanced by the plaintiff in this case. In the *Mugler* case, *Mugler* was indicted and convicted for manufacturing liquor for his own personal use. Justice Harlan, for the Court, says:

"And so, if, in the judgment of the Legislature, the manufacture of intoxicating liquors for the maker's own use as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the Courts upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far from such a regulation having no relation to the general and sought to be accomplished, the entire scheme of prohibition of Kansas might fail, if the right of liquors for its own use as a beverage were recognized. Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs anyone's constitutional rights or liberty or of property when it determines that the manufacture and sale of intoxicating drinks for general or individual use, as a beverage, are or may become hurtful to society and constitute, therefore, a business in which no one may lawfully engage. Those rights are best secured in our government by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare. *Crowley vs. Christensen*, 137 U. S. 86."

In *Preston v. Drew*, 33 Maine, 558; 54 A. Dec. 639, cited in the majority opinion in *Eidge v. Bessemer*, 164 Ala. 594, Shepley S. J. said:

"The State, by its legislative enactments, operating prospectively, may determine that articles injurious to the public health or morals shall not constitute property within its jurisdiction.

"It may come to the conclusion that spirituous liquors, when used as a beverage, are productive of a great variety of ills and evils, to the people, both in their individual and in their associate relations; that the least use of them for such a purpose is injurious, and suited to produce by a greater use serious injury to the comfort, morals and health; that the common use of them for such a purpose operates to diminish the productiveness of labor; to injure the health; to impose upon the people additional and unnecessary burdens; to produce waste of time and of property; to introduce disorder and disobedience of law; to disturb the peace and to multiply crimes of every grade. Such conclusions would be justified by the experience and history of man. If a Legislature should declare that no person should acquire any property in them for such a purpose, there would be no occasion for complaint that it had violated any provision of the Constitution."

In the North Carolina case of *So. Ex. Co. v. High Point* (N. C.) 83, S. E. 254, 255, Chief Justice Clark, in a concurring opinion, said:

"There is nothing in the State or Federal Constitution which prohibits the people of North Carolina, speaking through the Legislature, to prohibit the manufacture of intoxicating liquors even solely for one's own use. This is held in *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205, it following that the Legislature can equally prohibit the importation of such liquors by any person for his own use; and a fortiori it can forbid a common carrier, to bring in or import such liquors, irrespective of whether it is for the consignee's own use or not."

The Supreme Court of Alabama in case of *Southern Express Co. vs. Whittle*, 69 Sou. Rep. 652, said:

"The government does not interfere with or impair any one's constitutional rights of liberty or of property, when it determines that the manufacture or sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society. * * * Those rights are best secured, in our government, by the observance, upon the part of

all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare.' *Mugler v. Kansas*, 123 U. S. 623, 662-3. Neither the Fourteenth Amendment, nor any other, 'was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people.'

The Supreme Court of Idaho, case of *Ex Parte Crane* 151, Pac. Reporter, page 1006, recently passed upon the constitutionality of their law, which is as follows:

"Sec. 15. It shall be unlawful for any person to import, ship, sell, transport, deliver, receive or have in his possession any intoxicating liquors except as in this act provided."

"Sec. 22. It shall be unlawful for any person, firm, company, corporation or agent to have in his or its possession any intoxicating liquors of any kind for any use or purpose except the same shall have been obtained and is so possessed under a permit authorized by this act."

"The only means provided by the act for procuring intoxicating liquors in a Prohibition district for any purpose relates to wine to be used for sacramental purposes and pure alcohol to be used for scientific or mechanical purposes, or for compounding or preparing medicines, so that the possession of whisky or of any intoxicating liquor, other than wine and pure alcohol for the uses above mentioned, is prohibited."

The court quoted the decision of *Mugler vs. Kansas* and then said:

"Still it must be admitted that if the possession of such liquor 'can by no possibility injure or affect the health, morals or safety of the public,' the sale is equally harmless, for it only transfers the possession from one person to another."

The position of the court is clearly correct because the prohibition of the sale and the possession of liquor is the

means for facilitating its use. If the legislative department of government decides that possession is detrimental to the public welfare, such legislative discretion should not be overthrown by the judicial department of government.

Are the laws of West Virginia prohibiting the manufacture of intoxicating liquors by a citizen for his own use, the sale of such liquors in this State, constitutional and valid only so long as a way is left open for the securing by a citizen of the State of intoxicating liquors elsewhere, either in the United States or in some foreign country?

If a person has a constitutional right to purchase intoxicating liquors for his personal use, the seller would have the constitutional right to sell it to a person for such purchaser's personal use; and yet, it is settled beyond a doubt that no one has a constitutional right to sell intoxicating liquors. Such a right is not one of the rights of a citizen of a State or a citizen of the United States.

In the foregoing citation from *Mugler v. Kansas*, the Supreme Court of the United States declared that if in the judgment of the Legislature, the manufacture of intoxicating liquors for the maker's own use as a beverage would tend to cripple, if it did not defeat, the efforts of the people against the evils attending the use of such liquors, it is not for the courts to disregard legislative determination on that question. The court then proceeded to show that so far from such regulation having no relation to the general end sought to be accomplished, the entire scheme of Prohibition as embodied in the laws of Kansas might fail if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized.

Precisely the same line of reasoning is applicable when we come to deal with the alleged right of a citizen to purchase and import for his own use such quantities of liquor as he might desire.

Therefore, in order to accomplish the admittedly valid main purpose it is necessary for the State under its police power to have the right to forbid the reception or possession

of liquors even for the use of the citizens. This is a step which has a fair relation to the end to be accomplished; in fact, it is necessary for the accomplishment of the main purpose.

If the decision rendered in the *Mugler* case was correct, it necessarily follows for the same reason that the State has the right to deny to a citizen the right to have intoxicating liquors brought into the State even for his own use, since to allow him to do so might thwart the State in the exercise of a power which is conceded to exist.

THE PURPOSE OF ALL LEGISLATION RESTRICTING AND PROHIBITING THE SALE OF LIQUOR IS TO DISCOURAGE AND PREVENT ITS USE.

Opposing counsel have assumed that the State did not want to interfere with the use of liquor because statutes have not been passed, specifically prohibiting the use of liquor or the purchase of liquor. There is good reason why the States have followed the policy outlined.

The government has found that the best way to prevent the use of liquor is to cut off the means for furnishing the liquor to the individual for his use. When the law prohibits the sale of liquor, many people who have heretofore used it, discontinue its use. In many places the people have found it necessary to prohibit the furnishing and giving away of intoxicating liquor. This further discourages and prevents the use.

In order to meet the many evasions of the law, still other legislation was required. If anyone had a constitutional, inherent right to use liquor, then all of these laws which prevent the sale and furnishing of liquor would be unconstitutional. On the other hand, all of those laws prohibiting the sale or furnishing of intoxicating liquors have been upheld. If a State finds that it is necessary in order to eliminate the further use of liquor, to prohibit the shipments of liquor into dry territory, the same reason which sustained the former laws upholds this legislation

The strongest reason for prohibiting the sale or distribution of liquor is to discourage and prevent its use. There can be but one purpose in passing these laws, and that is to prevent the use of intoxicating liquor.

In *State vs. Maine* 20 L. R. A., 496, the court said:

"It is common knowledge that it is the use of intoxicating liquor as a beverage that is deemed hurtful and is the mischief sought to be prevented by the legislation. The prohibition of the sale of intoxicating liquors is only a means; the end sought for is the prevention, or at least the diminution of the drinking of intoxicating liquors by the people of the State. The legislation upon the subject, including the statute in question, should be construed to further that end, so far as the language, without bending either way, fairly allows." * * *

Taken in connection with the other legislation, its evident purpose is to further the ultimate purpose of all that legislation, viz.; to diminish the use of intoxicating liquor as a beverage.

Ex Parte Crane. 151 Pac. Rep. 1006.

The court, after quoting *State vs. Gilman*, 33 W. Va. 146, and *State vs. Williams*, 146 N. C. 618, and *Com. vs. Campbell*, 133 Ky. 50, said:

"Probably the author of none of these opinions would hesitate in holding that the sale of intoxicating liquor may be prohibited as a legitimate exercise of the police power and that such a law would not abridge any of the privileges or immunities of the citizens in such a way as to violate any constitutional provision. Still it must be admitted that if the possession of such liquor 'can by no possibility injure or affect the health, morals or safety of the public,' the sale is equally harmless, for it only transfers the possession from one person to another."

"The fact is that the harm consists neither in the possession nor sale but in the consumption of it. That is the evil which the people of Idaho, acting through the Legislature, are trying to eradicate, and since 'it will not require any elucidation to show that if the citizen may be prohibited from having liquor in

his possession he can be prohibited from drinking it, because of necessity, no one can drink that which he has not in his possession (quoting *Mugler v. Kansas*) that the manufacture for use would tend to cripple the effort to guard the community against the ends sought to be remedied."

Lincoln vs. Smith, 27 Vermont, 320 at 337.

"The primary object and end of the law is the prevention of intemperance, pauperism and crime; and the prohibition of the traffic is but the medium through which the object and end of the law is to be attained."

"If it be once granted that the use of intoxicating liquors as a drink is worse than useless, and intemperance a legitimate consequence of such use, and that intemperance is an evil, injurious to health and sound morals, and productive of pauperism and crime; it seems to us that a law designed to prevent such consequences must clearly fall within the class of laws denominated police regulations. The legislature in passing the law in question doubtless supposed that the traffic and drinking of intoxicating liquors went hand in hand and that they were even more than twin sisters, that they were not only born together, but that they would also die together, and that by cutting off the one the other would also fall with it.

Marks vs. State—159 Ala.—71, at page 84.

"The main object and purpose of all is the same * * * to promote temperance and prevent drunkenness. * * * The evil to be remedied is the use of intoxicating liquors as a beverage * * * and the object of the law in this particular must not be lost sight of in its interpretation."

See also *State vs. Delaye*, 68 S. 995, in which the court quotes the preamble of the act in question as a guide in their interpretation:

"Whereas it is the public policy of this State to discourage the use and consumption of prohibited liquors, etc.

"So. Exp. Co. vs. Whittle, 69 So.—652. The object and purpose of all laws governing the subject of intoxicating liquors is 'To promote temperance.' The evil to be remedied is the use of intoxicating liquors as a beverage.

State vs. Phillips, 67 So. 651.

"The ultimate purpose and end of prohibition is to prevent the use of liquors as a beverage. This ultimate end is approached step by step, and when the preponderant and prevailing morality of the nation believes that the public welfare demands the final step the way will be found to accomplish the end."

The United States Circuit Court of Appeals, 4 Cir. Fed. Rep., Vol. 219, No. 4, April 1, 1915, said on this question:

"In trying to comprehend the legislative purpose in prohibition statutes it is important to remember that the ultimate end sought in prohibition legislation is not the prevention or restriction of the mere sale of intoxicants, but the prevention of their consumption as a beverage. The sale being the most usual and obvious means by which drinking is accomplished, legislation is more often directed against the sale. But it is upon the recognized evil of individual consumption as a beverage that the right of a State under its police power, rests to enact prohibitive legislation; and in the exercise of that right it cannot be denied that the State may legislate not only against acts which would constitute a sale at common law, but against other acts within its borders, such as deliveries by common carriers, which tend to defeat or weaken its public policy of preventing the consumption of liquor as a beverage."

There is no proposition better settled than the above. It is for the purpose of diminishing, discouraging and preventing the use of liquor as a beverage that all of these laws are enacted.

WEBB-KENYON LAW VALID AS A POLICE REGULATION

Freund in his work entitled "Police Power, Public Policy and Constitutional Rights," says:

"The Federal exercise of the police power through positive legislation rests upon the enumerated powers of Congress under the Constitution. The principal power looking to the promotion of the internal public welfare is that of regulating commerce with foreign nations and among the States. The power to regulate commerce includes the power to prohibit and suppress objectionable forms of traffic. Under this power Congress has also legislated regarding shipping and navigation, interstate common carriers, and combinations in restraint of trade.

"In view of all this legislation, it is impossible to deny that the Federal government exercises a considerable police power of its own. This police power rests chiefly upon the constitutional power to regulate commerce among the States and with foreign nations, but not exclusively so."

The United States has exercised an ample police power over Indians partly under the commerce clause of the Constitution.

In the Rahrer case, 140 U. S. 345, it was said in sustaining the Wilson act that that act was:

"Enacted in the exercise of its police powers and is constitutional and valid."

The lottery case above referred to holds that the Wilson act was sustained in the Rahrer case:

"As a valid exercise of the power of Congress to regulate commerce among the States."

In the Addyson case (175 U. S. 211) the power of Congress is affirmed to regulate interstate commerce to any substantial extent. In the lottery case the power to regulate is put to the essential test whether the legislation is for the purpose of ^{safe} regarding the morals of the people of the nation or involves that purpose.

"It may be said in a general way that the police power extends to all the great public needs." *Canfield v. U. S.* 167, 518, 42 L. Ed. 260.

"It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong

and preponderant opinion to be greatly and immediately necessary to the public welfare." Holmes J. in *Nobles State Bank v. Haskell*, 219 U. S. 104, 55 L. Ed. 112.

In *Phalens* case (8 How. 161, 168) it is observed "that the suppression of nuisances, injurious to public health or morality, is among the most important duties of government."

In the case of *Hoke v. State*, 227 U. S. 309:

"Congress may adopt not only the necessary, but the convenient means necessary to exercise its power over a subject completely within its power, and such means may have the quality of police regulation.

"Congress is given power to regulate commerce with foreign nations and among the several States. The power is direct; there is no word of limitation in it, and its broad and universal scope has been so often declared as to make repetition unnecessary. And, besides, it has had so much illustration by cases that it would seem as if there could be no instance of its exercise that does not find an admitted example in some of them. Experience, however, is the other way, and in almost every instance of the exercise of the power differences are asserted from previous exercise of it and made a ground of attack. The present case is an example. * * *

"Our dual form of government has its perplexities. State and nation have different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people, and the powers reserved to the States and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. This is the effect of the decisions, and surely if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of foods and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women and more insistently of girls."

Congress in this instance has not even felt compelled to resort to "convenient" means in the exercise of its power. It has used only such power as is necessary to provide for the enforcement of law. If Congress had used its complete discretionary power, all liquors would have been denied the privilege of interstate commerce. In other words, Congress has the same power and discretion to deal with interstate commerce by enacting police regulations that the State has in enacting laws to control, or prohibit, the traffic.

LEGISLATIVE POWER MAY PROHIBIT ACTS INNOCENT IN THEMSELVES IF THE LAW-MAKING BODY THINKS THE ADMITTED EVIL CANNOT BE PREVENTED EXCEPT BY THE ENACTMENT OF SUCH A LAW.

It is well settled in law that when authority is given the Legislature or Congress to pass a law, it carries with it also authority to pass any additional legislation to make the law enforceable. This proposition is also re-enforced to the legislation now under consideration by the United States itself. Clause 18, section 8, article 1, specifically gives to Congress power to make all laws which shall be necessary and proper for carrying into execution the power given in passing interstate commerce laws. Authority is given Congress to pass a law controlling interstate commerce, and this carries with it the power to eliminate from interstate commerce any article which Congress deems to be detrimental to public morals or public health. There are many authorities for the proposition that laws may be passed by the Legislature or by Congress to make effective existing legislation. One of the familiar lines of authorities is that which prohibits non-intoxicating liquors to be sold, when the only authority given in the Constitution is to regulate or prohibit intoxicating liquors. The court upholds the law on the ground it is necessary to include innocent acts often in order to prevent the evils admitted. No one will deny that the States have full power to prohibit the manufacture and sale of intoxicating liquors. No authority

is given for the State to prohibit non-intoxicating liquors. The courts, however, have upheld such legislation because it was necessary to enforce law. The same principle is involved in national legislation in dealing with the liquor traffic.

In the case of *United States vs. Cohn*—Court of Appeals of Indian Territory, 32 S. W. Rep. 38, the court had before it the duty of interpreting the Federal statute which forbade the sale within the territory of a non-intoxicating liquor known as Rochester tonic. The opinion at length discussed the right of the States in the exercise of their police power to prohibit the sale of such beverage and decides that whatever the States may do in that behalf, Congress may do for the territories. After quoting the statute at length, the court said:

"No one can carefully read this statute but that he will be impressed with the idea that Congress, whatever it omitted to do, intended to completely cover the whole case; and to erect and complete an impregnable barrier against the introduction, sale and use of intoxicating liquor in all of its forms and to guard against all of the well-known subterfuges resorted to to deceive courts and juries in relation to the matter. * * * Congress evidently had some purpose in thus changing the ordinary and common use of language."

In *State vs. Frederickson*, 101 Me. p. 37, the court reaffirms this proposition as follows:

"The liquors above enumerated are declared intoxicating by law. In determining whether or not a liquor is to be regarded as intoxicating under this enumeration, it is entirely immaterial whether it is intoxicating in fact. As was well said in *State v. Connell*, 99 Me. 61: 'It is not for the jury to revise the judgment of the Legislature and determine whether a liquor is or is not intoxicating.' When it appears that a liquor comes within the scope of the forbidden enumeration, that moment its intoxicating character becomes fixed by law, and its non-intoxicating character, as a matter of fact, becomes entirely im-

material with respect to the application of the statute. *Commonwealth vs. Bos*, 116 Mass. 36; *Com. vs. Athens*, 12 Gray 29; *Com. vs. Brelsford*, 161 Mass., 61; *State vs. Piche*, 98 Maine 348; *State vs. O'Connell*, 99 Maine, 61; *Com. vs. Show*, 133 Mass. 575; *State vs. Intoxicating Liquors*, 76 Iowa, 243; *State vs. Guinness*, 16 R. I. 401."

This power has frequently been used both by the State and Federal government to make effective, legislation which has been legally enacted. The following are a few of the many citations illustrating this principle, and showing the extent to which it has been sustained by the State and Federal courts:

Elder v. State, 162 Ala. 41.
State v. George, (La.) 67 South 953.
Feibleman v. State, 120 Ala. 122.
Dinkins v. State, 149 Ala. 49.
Lambee v. State, 151 Ala. 86.
Eaves' case, 113 Ga. 749, 30 S. E. 218.
O'Connell's Case, 99 Maine 61, 58 Atlantic 59.
United States v. Cohn, 32 S. W. 38.
Pennell v. State, 123 N. W. 115.
State v. Walder, 83 Ohio St. 68, 84.
State v. Frederickson, 101 Maine 36, citing.
Com. v. Blose, 116 Mass. 36.
Com. v. Athens, 112 Gray, 29.
Com. v. Brelsford, 136 Mass. 61.
Com. v. Piche, 98 Maine, 348.
Com. v. Show, 133 Mass. 575.
State v. O'Connell, 99 Maine 61.
State v. Intoxicating Liquors, 76 Iowa, 243.
State v. Guinan, 66 R. I. 401.

The latest and most convincing decision upon this question is that of *Purity Extract & T. Co. v. Lynch*, 226 U. S. 192, 57 L. Ed. 184; 187, involving the right of the State of Mississippi to prohibit a non-intoxicating malt liquor called "Poinsetta." It is logical, convincing and decisive on the point in question. Justice Hughes, speaking for the court, said:

"That the State, in the exercise of its police power, may prohibit the selling of intoxicating liquors, is

undoubted."—*Bartmeyer v. Iowa*, 18 Wall., 189, 21 L. Ed. 929; *Boston Beer Co. Mass.*, 97 U. S. 25, 24 L. Ed. 989; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205, 8 Sup. Ct. Rep. 273; *Kidd v. Pearson*, 128 U. S. 1, 32 L. Ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Crowley v. Christensen*, 137 U. S., 86, 43 L. Ed. 620, 11 Sup. Ct. Rep. 12. "It is also well established that, when a State exercising its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end, as it may deem necessary in order to make its action effective. It does not follow that because a transaction, separately considered, is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government." *Booth v. Illinois*, 184 U. S. 425; 46 L. 623, 22 Sup. Ct. Rep. 168; *Ah Sin v. Wittman*, 198 U. S. 500, 504, 49 L. Ed. 1142, 1144 25 Sup. Ct. Rep. 756; *New York Ex rel, Silz v. Hesterberg*, 211 U. S. 31, 63 L. Ed. 75, 29 Sup. Ct. Rep. 10; *Murphy v. Calif.*, 225 U. S. 623; 56 L. Ed. 1229, 32 Sup. Ct. Rep. 697. "With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the Legislature—a notion foreign to our constitutional system."

It would be difficult to find a more appropriate exercise of law-enforcement power than the Webb-Kenyon law. It not only deals with intoxicating liquor, which is admittedly a proper subject matter to be controlled by such power, but to make the exercise of such power more appropriate, it deals only with outlawed liquors. When Congress is given power over the subject matter of liquor in interstate commerce, it necessarily includes power to deal with such liquors as are outlawed by the States.

CASES CITED BY APPELLANT MAY BE
DISTINGUISHED

In appellant's brief upon the former hearing, it was claimed and it doubtless will be again claimed, that the Kentucky cases, **Com. v. Campbell**, 133 Ky. 60, and others following it, **Williams v. State**, 146 N. C. 618, **Eidge v. Bessemer**, 164 Ala. 599, and **State v. Gilman**, 33 W. Va. 146; support appellant's contention that under constitutional government in the United States no government has the right to deny to a citizen the right to obtain intoxicating liquors for personal use, or as complainant's counsel will probably state it, that no Government has the right to regulate the personal habits of adult citizens not under disability.

Since the first hearing of these cases before the Court, the cases from three of the States afore noted have been explained, modified, or limited, in such a way that they no longer lend support to appellant's contention. We later refer to and consider the Kentucky cases; it is desirable now to briefly review the other cases named above:

(1.)

STATE v. GILMAN, 33 WEST VIRGINIA, 146

In **State v. Sixo**, decided by the Supreme Court of Appeals of West Virginia, November 30, 1915, the Court called attention to the fact that the **Gilman Case** was decided under the previous Constitution, whereas the Prohibition amendment effective July 1, 1914, had prohibited the manufacture and keeping for sale of malt, vinous, spirituous liquors, etc., and required the Legislature to "enact such laws with regulations, conditions, securities, and penalties, as may be necessary to carry into effect the provisions of this section," and in that connection, the Court said that it does not follow from the decision in **Gilman's case**, "that the Legislature, in the exercise of the police power, may not provide reasonable regulations as to the conditions upon which intoxicating liquors may be

brought into the state, or carried from one place to another within the state;" and it cites with approval the case of *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, declaring the well-settled doctrine of this Court, in the following language:

"It does not follow that because a transaction separately considered, is innocuous, it may not be included in a Prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government."

In *State v. Phillips*, (Miss.) 67 So. Rep. 651, the Supreme Court of Mississippi thus wrote concerning the *Gilman* case:

"In *State v. Gilman*, supra, the Supreme court of West Virginia was passing upon the validity of a statute of that state which denounced as a misdemeanor the keeping in possession of spirituous liquors for another by any person not the owner, who had obtained a license therefor. The decision went off upon the Court's interpretation of the State Constitution, which declared "laws may be passed regulating or prohibiting the sale of intoxicating liquors, the Legislature was without power to pass the statute. The Court also held that the statute could not be upheld as coming within the police power of the State. We do not consider this decision of much value in this case, because the statute there reviewed is radically and substantially different from the statute we are considering, and besides the question before the Court was complicated by the Constitution of West Virginia."

In the *Gilman* case, decided November 9, 1889, two questions were considered: (1) Whether the statute prohibiting one from keeping in his possession liquors for another was violative of the Fourteenth amendment of the Federal Constitution, and (2) Whether it was violative of a provision in the then State Constitution, declaring that laws may be passed regulating or prohibiting the sale of intoxicating liquors within the State. The decision on the second

ground is without value now, because the constitutional provision has been superceded by the Prohibition amendment of West Virginia effective July 1, 1914. In so far as the decision was rested on the Fourteenth amendment of the Federal Constitution, it cannot now be accepted for several reasons. It is entirely out of harmony with subsequent decisions of the Supreme Court of the United States, and particularly with the case of **New York v. Hesterberg**, 211 U. S. 31, and **Patson v. Penn.**, 232 U. S. 138. Furthermore, in **State v. Davis**, No. 2864, decided November 30, 1915, the Supreme Court of West Virginia said in regard to a statute prohibiting the advertising of liquors:

"A liquor dealer residing and doing business in another State, who by the agency of the United States mails, sends into this state unsolicited and there circulates or distributes to prospective customers, price-lists, circulars, and order blanks advertising his liquors for sale, and which he proposed to ship into this State to them, and which advertising matter by such agency is actually delivered to a citizen of this State, is guilty of a violation of Section 8, Chap. 15, Acts of the Legislature of 1913, known as the Yost law, and may be indicted and punished as provided by such act. . . .

"To so construe said act by virtue of the Acts of Congress known as the Wilson act and Webb-Kenyon act, does not infringe on the commerce clause of Section 8, Article 1, of the Federal Constitution.

"Nor does the provision of Section 8 of said Act of 1913 so construed and applied, violate the privileges and immunities clause of the Fourteenth amendment of the Federal Constitution."

(2.)

EIDGE v. BESSEMER, 164 ALABAMA, 599

This case was distinguished in former hearing, but since then it has been destroyed as any authority here by the later decision of the Supreme Court of Alabama in **Southern Express Co. v. Whittle**, 69 So. Rep. 682, decided June 17, 1915.

In that case the Supreme Court of Alabama held that it was competent for the Legislature of Alabama to pass a statute limiting the quantity of liquor that a citizen might receive or possess for personal use, and further that the State had the same right under the police power to totally prohibit receipt and possession or importation of liquor, that it had to prohibit its manufacture.

The Court dealt specifically with the **Eidge case** and explained that it could not be regarded or accepted as a governing authority in the case then in hand, for the several reasons stated, one of which was that the **Eidge case** dealt with an ordinance of a Municipality and not with a statute of the State—the ordinance going beyond and in advance of any State statute then of force.

It is interesting to note also that the Supreme Court of Alabama in the **Whittle case** disapproved the majority view in the case of **State v. Williams**, 146 N. C. 618 and stated that it would not follow the case of **West Virginia v. Gilman**, 33 W. Va. 146, since it was opposed to the doctrine or principle in the Alabama case of **Williams v. State**, 179 Ala. 50.

(3.)

STATE v. WILLIAMS, 146 NORTH CAROLINA 618

The majority opinion in the above case has been declared unsound by the Supreme Court of Alabama in **Southern Express Co. v. Whittle**, 69 So. Rep. 652, and by the Supreme Court of Mississippi in **Phillips v. State**, 67 So. Rep. 651.

The Supreme Court of North Carolina itself, in the case of **Glenn v. Southern Express Co.**, decided December 1, 1915, has had occasion to consider the **Williams case**. After sustaining the North Carolina anti-shipping law, similar in principle to the Alabama anti-shipping law, and preparatory to following the decision of the Alabama Court in **Whittle's case**, Mr. Justice Allen, speaking for the whole Court, said that the question as to whether common carriers might not be forbidden to transport intoxicating liquors

into Prohibition territory was not decided, but expressly reserved, in **State v. Williams**, 146 N. C. 618. It was then said in the opinion:

"The State has declared that intoxicating liquors shall not be sold or manufactured within the State, and one of the principle difficulties in the enforcement of this law is the impossibility of distinguishing between liquors brought into the State for use and those introduced for sale, and the bringing in of such liquors as being for personal use when intended for sale has been such a prolific source of evasion of Prohibition laws, that restrictions upon the right of delivery into the State are necessary to prevent illicit sales."

The Court then cited with approval the following from **Mugler v. Kansas**, 123 U. S. 623.

"Nor can it be said that government interferes with or impairs anyone's constitutional right of liberty or property when it determines that the manufacture or sale of intoxicating drinks for general or individual use as a beverage are or may become hurtful to society, and constitute, therefore, a business in which no one may lawfully engage."

The argument of the appellant against the West Virginia law is based upon the false assumption that a citizen has a constitutional right to buy or have liquor shipped to him for his personal use. Unless there is some specific provision in the Constitution of the State that guarantees to its citizens this right, then there is no such right. The following propositions are well-settled:

There is no inherent right in a citizen to sell intoxicating liquor as a beverage for personal use, as was held in **Crowley v. Christensen**, 137 U. S. 86.

No one has any constitutional right to manufacture liquor for his own use. **Mugler v. Kansas**, 123 U. S. 623.

No one has a constitutional right to have a solicitor offer to sell him intoxicating liquors for his own use from outside of the State, even though it is contemplated that

an interstate carrier bring the liquor to him. **Delamater v. State**, (S. Dak.) 205 U. S. 93.

No one has a constitutional right to have liquor advertisements sent to him, in order that he may buy liquor for his own use. **State v. Delaye**, 69 So. Rep. 993.

All anti-liquor prohibitory statutes are designed to reduce, restrict, or prevent the personal use or consumption of intoxicating beverages.

As the Supreme Court of Mississippi well said in **State v. Phillips**, 67 So. Rep. 651.

"If the object of Prohibition of the sale of intoxicating liquors is not to prevent, as far as may be, the drinking of such liquors, then it is difficult to justify the laws prohibiting the sale. Of course the typical public saloon is demoralizing, but there would be no particular difficulties in the way of so regulating the saloon as to minimize all of the evils which flow from the saloon, except the evils which flow from the drinking of intoxicating beverages. If it is not a menace to the health, morals, welfare, and peace of the public for men and women to drink alcoholic liquors, it would seem that the public could have no interest in prohibiting the sale. The ultimate purpose and end of Prohibition is to prevent the use of liquor as a beverage. This ultimate end is approached step by step, and when the preponderant and prevailing morality of the nation believes that the public welfare demands the final step, the way will be found to accomplish the end."

THE NECESSITY FOR AND PURPOSE OF THE WEBB-KENYON ACT

For half a century prior to 1888, the Courts recognized the jurisdiction of the State over interstate shipments of liquor from the time they entered the state, the same as other domestic liquors. This policy was reversed in the case of **Bowman v. Northwestern**, 125 U. S. 500, and in the subsequent case of **Leisy v. Hardin**, 135 U. S. 124. In reversing this policy, the Court predicated its announcement,

not upon the inability of Congress to act in the premises, but on the ground that inasmuch as Congress had enacted no law restricting or limiting interstate commerce, it was its desire "that such commerce shall be free and untrammelled."

The Wilson act followed very soon after the decision of *Leisy v. Hardin*, 135 U. S. 124, 34 L. Ed. 128; and the construction placed on the Wilson act in *Rhoades v. Iowa*, 170 U. S. 412, 42 L. Ed. 1088, started the movement for further congressional relief that would enable the States to enforce their laws, and notably their police laws, without infringing upon the right of Congress to regulate commerce. The use of the words "received, possessed, sold, or in any manner used in violation of any law of such State, etc." shows Congress intended to recognize to the fullest extent whatever valid State laws might be enacted prohibiting or regulating the receipt, possession, sale or other use in any manner, of the liquors mentioned in the act.

Whereas under the Wilson act, interference by the State could not occur until after delivery to the consignee whereby under the commerce clause of the Federal Constitution the consignee had the right to order and receive such liquors for his own use (*Vance v. Vandercook*, 170 U. S. 428, 42 L. Ed. 1100), now under the Webb-Kenyon law, shipment into a State is prohibited by Congress if any person interested therein intends to receive, possess or in any manner use, as well as to sell such liquor in violation of the State law.

In the case of *West Virginia v. Adams Express Co.* 219 Fed. Rep. 794, paragraph 13 of the opinion, the Court dealt with the contention that was made by opposing counsel, to the effect that the quoted language of Mr. Justice White in *Vance v. Vandercook Co.* 170 U. S. 438, gave countenance to the notion that Congress has no right to legislate against the shipment or transportation of liquor intended for personal use from a license State to a Prohibition State, but the Court said in reference to the quoted language, that:

"It is perfectly manifest that this language refers to the constitutional provision giving the Congress control of interstate commerce to the exclusion of the states, and not to the power of the Congress under the authority of the Constitution to exclude absolutely or conditionally, deleterious substances."

This idea is later on further elucidated by Justice White in *American Express Co. v. Iowa*, 196 U. S. 133; 49 L. Ed. 417, where after stating the points decided in *Leisy v. Hardin & Rhoades v. Iowa*, and stating that the doctrine in those cases was applied in *Vance v. Vandercook Co.* 170 U. S. 438, to the right of a citizen of South Carolina to order from another State for his own use merchandise consisting of intoxicating liquors to be delivered in the State of South Carolina, he said:

"Those cases rested upon the broad principle of the freedom of commerce between the States and the right of a citizen of one State to freely contract to receive merchandise from another State, and of the equal right of a citizen of a State to contract to send merchandise into other States. They rested also upon the obvious want of power of one State to destroy contracts concerning interstate commerce, valid in the State where made."

The Webb-Kenyon Act was intended to alter the rules above declared and to relieve the police power of the State from the dominion, under which it had long rested, of the commercial clause of the Federal Constitution. The existence and extent of the police power of the State and the former supremacy of the commerce clause of the Constitution over the police power will be clearly brought forth by considering two paragraphs from the opinion of Chief Justice Fuller in *United States v. E. C. Knight*, 156 U. S., L. Ed. 325, where he said:

"It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always

belonging to the States, not surrendered by them to the general Government, not directly restrained by the Constitution of the United States, and essentially exclusive.

"On the other hand, the power of Congress to regulate commerce among the several States is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraints. Therefore it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by several States, and if a law passed by a State in the exercise of its acknowledged powers comes in conflict with that will, the Congress and the State cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof; and that which is not supreme must yield to that which is supreme."

The Webb-Kenyon Act removed this conflict between the police power of the State and the exclusive power of Congress to regulate commerce, insofar as intoxicating liquors are concerned, by declaring that such liquors should become outlaws and contrabands of commerce, "when intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of any law of the State."—Hence, for the first time, from and after March 1, 1913, the States were placed in a position where they could exert their police power to the fullest extent to secure real and effective Prohibition of the liquor traffic within their borders, and to reduce, restrict, or entirely prevent, if they deemed best to do so, the possession, or receipt of intoxicants, unless, of course, there be some provision in their State Constitutions which prevented their exerting their police power to this extent. Congress no longer permits the declared and legal policy of the States, seeking to protect their people against the mischiefs of intoxicating alcoholic poisons, to be overthrown or disregarded by the agency of interstate commerce.

This Court enunciated this safe and fundamental principle in the case of *Champion v. Ames*, 188 U. S. 356, in the following language:

"In legislation upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States—perhaps all of them—which for the protection of public morals prohibited the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It is said in effect THAT IT WOULD NOT PERMIT THE DECLARED POLICY OF THE STATES WHICH SOUGHT TO PROTECT THEIR PEOPLE AGAINST THE MISCHIEFS OF THE LOTTERY BUSINESS TO BE OVERTHROWN OR DISREGARDED BY THE AGENCY OF INTERSTATE COMMERCE."

The same reasoning which guided the Court in this great decision can with greater force be applied to the case at bar. The people of the States in their struggle to advance civilization and eliminate this great evil have prohibited the liquor traffic in the smaller units of Government and in 19 of the States. They made this advancement on the theory that the electorate in every unit of Government have an inherent right to better their conditions whenever the legally constituted majority in such territory desire so to do in a legal manner. As civilization advances, new conditions arise. Old customs, and traffics, which were once permitted and sanctioned, under the searchlight of truth and science are found to be injurious and are eliminated. Our Constitution, as the Supreme Court of Kansas has well said, has the marching quality in it. It opens the way for progress when the people are ready for it. Through decades of hard work, and great sacrifice the electorate have abolished the liquor traffic in 80 per cent of the area of this country. At each step of advancement they have been met by the stubborn opposition of the liquor interests. Every attempt to further curtail the liquor traffic was met by some new scheme to

evade the law. Their last refuge is the interstate commerce provision of the Constitution.

After the saloon and beverage traffic is prohibited in a State, the liquor interests use the railroads and express companies as their bartenders, to force their liquor into this territory. To require the officers of the State to wait until the liquor is delivered and then watch for an overt act of lawlessness, is placing an unreasonable and unnecessary burden upon the officers and the people who have done their best to free themselves from what they consider a curse.

Surely the State is entitled to this much protection from the Federal Government. It was granted to the States in the case of lotteries and it did not cause a fraction as much crime and misery and poverty as the liquor traffic produces. Even more consideration should be given States in combating the evils of the liquor traffic than was granted to them in suppressing the evils of lotteries.

Congress has granted this relief and the States have received a new impetus in their handicapped effort to enforce the law. It is inconceivable that a great Nation like this whose fundamental purpose is to promote the general welfare should allow any of the States to be crippled in their effort to enforce laws for the public good.

The Federal Constitution was never intended by our forefathers to be an instrument to protect lawlessness. It has always been construed so as to aid officers in the performance of their duties in enforcing law.

15

PUBLIC POLICY AND THE PRESUMPTION OF CONSTITUTIONALITY

Unless there is such conflict between the law and the Constitution that cannot be reconciled, it should be sustained.

In *United States v. Harris*, 106 U. S. 635; 27 L. Ed. 290; Mr. Justice Woods, speaking for the Court said:

"Proper respect for co-ordinate branch of the Government requires the Courts of the United States to give effect to the presumption that Congress will pass no act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an act in question is clearly demonstrated."

In *A. T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. Ed. 909, Mr. Justice McKenna said:

"It is also a maxim of constitutional law that a Legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purposes of promoting the interests of the people as a whole, and Courts will not lightly hold that an act duly passed by the Legislature was one in the enactment of which it transcended its powers."

In *Brown v. Walker*, 161 U. S. 590; 40 L. Ed., 819, Justice Brown, speaking for the Court, says:

"That the statute can be upheld, if it can be construed in harmony with the fundamental law, will be admitted. Instead of seeking for excuses for holding acts of the legislative power to be void by reason of their conflict with the Constitution, or with certain supported fundamental principles of civil liberty, the effort should be to reconcile them, if possible, and not hold the law invalid unless, as was observed by Mr. Chief Justice Marshall in *Fletcher vs. Peck*, 10 U. S. 88; 3 L. Ed. 162, the 'opposition between the Constitution and the law be such that the Judge feels a clear and strong conviction of their incompatibility with each other.'"

In *United States v. Gettysburg Elec. R. Co.*, 160 U. S. 668; 40 L. Ed. 576, the Court speaking through Mr. Justice Peckham said:

"In examining an act of Congress it has been frequently said that every intendment is in favor of its constitutionality. Such an act is presumed to be valid unless its invalidity is plain and apparent; no presumption or invalidity can be indulged in, it must be shown clearly and unmistakably. This rule has been stated and followed by this Court from the

foundation of the Government. * * * That an act of Congress which plainly and directly tends to enhance respect and love of a citizen for the institution of his country, and to quicken and strengthen his motives to defend them * * * must be valid."

The above decisions, and many others, have given assurance to the people that when they are striving to promote the public good and the sobriety and welfare of the people, that laws reasonably adapted to carry out that purpose will be sustained. Public sentiment, and the overwhelming majority of Congress, agreed that the outlawed liquor traffic should not have Federal protection through interstate commerce. Such a law is reasonably adapted to the end sought. The State of West Virginia has prohibited the manufacture and sale of liquor for beverage purposes. In order to secure the benefits of their organic statutory law, they found it necessary to prevent the soliciting of orders through the mails, the possession and receipt of intoxicating liquor through common carriers.

All of these laws have a direct bearing upon the main purpose sought, namely, to promote sobriety among the citizenship of the State, and to limit and discourage the use of intoxicating liquor. When it is conceded that the State may prohibit the manufacture, sale and distribution of intoxicating liquor as a beverage within the State, it logically follows that to make those laws enacted under the police power effective, the means for securing liquors from outside of the State must be inhibited also by the legally constituted authority, to-wit; Congress. The Federal legislative authority has enacted the law to divest such outlawed liquors of their interstate character. The State, under the authority of the new Constitution and police power, has wisely used its discretion in prohibiting practically every phase of the beverage traffic. This furnishes us what Justice Johnson called in his concurring opinion in *Gibbons v. Ogden*, 9 Wheat, 1—"A frank and candid co-operation for the general good."

THE PROTECTION OF PUBLIC HEALTH AND PUBLIC MORALS A NECESSITY

It is well settled that the safeguarding of the public health and public morals is essential to the perpetuity of Government. Whatever else the police power may include, it admittedly grants to the government the right to protect these two essentials—the public health and the public morals. This necessarily means that the Constitution must be construed, as new conditions arise, so as to carry out its fundamental purpose. This is what the Supreme Court of Kansas had in mind when they quoted in their recent decision from Willoughby on the Constitution:

“The national Constitution, under the guidance of our great Court of last resort, has grown and developed, not perhaps like an unwritten one, but still keeping abreast with the demands of progressing history.”

This theory is in complete harmony with the decision of this Court in the case of *United States vs. Gettysburg*, *supra*, and the application of that case made by the Kansas Supreme Court, to-wit: “It is of as much national importance to make a man sober as to make him patriotic.”

The above decisions deal with the very fundamentals of government. Without public morals, public health and patriotism, government itself would cease to exist. Any law which has reasonable relation to the safeguarding of these fundamentals of government and is not in irreconcilable conflict with the Constitution, must be valid. Relying upon these well recognized principles found in the most enlightened public conscience and Court decisions, the people have patiently and persistently and against great odds opposed the beverage liquor traffic until the following States and subdivisions have outlawed it.

The absolute prohibition of the sale of intoxicating liquors for beverage purposes has been adopted by nine-

teen States, Maine, Kansas, North Dakota, Georgia, North Carolina, South Carolina, Oklahoma, Mississippi, Tennessee, West Virginia, Virginia, Colorado, Washington, Oregon, Arizona, Iowa, Idaho, Alabama and Arkansas.

The Legislatures of twenty-four other States (California, Connecticut, Delaware, Florida, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New York, Ohio, Rhode Island, South Carolina, Texas, Utah, Vermont and Wisconsin) have by law prohibited the sale of intoxicating liquors in certain classes of political subdivisions, prohibition becoming operative whenever a majority of the electors in a regular or special election indicate by vote that they wish the provisions of the law to apply.

In still other States the Legislatures have arbitrarily placed certain areas under prohibition legislation, thus adding to the aggregate population in prohibition territory. Since September of 1914, ten States have adopted Prohibition. The steady growth of territory which seeks protection from a law like the one in question is shown by the following facts:

- Four States dry in 1907;
- Five States dry in 1908;
- Nine States dry in 1909;
- Ten States dry in 1914;
- Nineteen States dry in 1916.

In Utah the Legislature prohibited the traffic. The Governor of the State waited until after the Legislature adjourned, then vetoed the measure. The next Legislature will doubtless enact a prohibitory law. About five other States have fixed dates for elections for a State vote, and most if not all of them will be successful in abolishing the liquor traffic.

Approximately 80 per cent of the territory of the United States has abolished the beverage liquor traffic, and about 57 per cent of the population live in that territory.

With the majority of the people of the States living in dry territory, and an increase of those who live in dry territory amounting to 1,500,000 on the average every year for 20 years, the public necessity for this law is certainly manifest.

As a result of the rapidly growing sentiment against the liquor traffic and the more effective means at hand for enforcing the law, the decrease in the sale and consumption of liquor has been marked the last year. According to the official United States Government Report, published recently by Internal Revenue Commissioner, Mr. Osborne:

"The consumption of fermented liquors decreased for the past year . . . 200,300,436 gallons.

"And the consumption of distilled liquors decreased 14,983,333 gallons.

"Or a total decrease in consumption of all liquors 215,283,769 gallons.

"Estimating the population of the United States at one hundred million, this report shows a decrease in consumption of 2.15 gallons per capita.

"That is the largest decrease in liquor consumption ever reported for any one year in the nation's history."

This report shows a decrease in the number of liquor dealers of 16,270 for the year or at the rate of forty-four per day for the year ending June, 1915.

Should this part of our citizenship, battling against one of the nation's greatest evils, be limited or discouraged in a laudable effort to have laws enforced for an eminently legal purpose? The power to reach violations of law must be lodged somewhere in government. The State has prohibited the traffic and all of the incidents of the traffic which produce the recognized evils within their borders. Congress has divested intoxicating liquor of its interstate character when it is shipped into the State in violation of the State laws. Both the Federal and the State government have tried to follow the rule laid down by this Court

in the case of *Hoke vs. State*, 227 U. S. 309, where the Court said:

"Our dual form of government has its perplexities, state and nation have different spheres of jurisdiction as we have said. But it must be kept in mind that we are one people and the powers reserved to the states and those conferred on the nation are adapted to be exercised whether independently or concurrently to promote the general welfare materially or morally."

Both the material and moral welfare of the State of West Virginia are involved in the outcome of this case. In spite of the determined opposition of the liquor interests from outside the State and their effort to break down the enforcement of the law, the public good has been greatly advanced by the operation of these statutes. The public records show crime has been reduced 60 per cent and the arrests for drunkenness 50 per cent in the last year, ending July, 1915. With the aid of this law, if sustained, and the State laws which are involved in this hearing, still greater results will follow.

The material welfare has been advanced equally with the moral welfare. Governor Hatfield recently gave the following testimony concerning the operation of these laws:

"While West Virginia loses about \$700,000 a year in revenue from the saloons, within the next few years we expect to reduce our State expenses for the handling of criminal charges, and the maintenance of state asylums that will offset the loss from the revenue paid for legalizing the saloon traffic.

"We feel that our standard of civilization will be higher, and that the generations to come in West Virginia will be better from the standpoint of strength, intelligence, education and other environments which means so much to the success of a great and growing State, unlimited in natural wealth such as ours, and upon which depends our standard of citizenship as to what the future of our State and its achievements may be."

The States that are making the fight to maintain the standard of sobriety and morality should be encouraged and unhampered. Every reasonable doubt should be resolved in their favor in sustaining a law intended for the public good. This Court has construed the Federal Constitution broadly from time to time as the necessity arose for legislation to eliminate the evils that injure public morals. The same wise, far-seeing policy which has been used in sustaining similar laws in the past will uphold this law. Precedent, reason and enlightened public policy furnish a safe basis for sustaining the constitutionality of the Webb-Kenyon law.

17

WEST VIRGINIA STATUTES INVOLVED IN THIS HEARING

The provisions of the West Virginia statutes which are in controversy in this hearing are as follows:

The prohibition of the receipt, or possession of intoxicating liquor from a common carrier.

18

WEST VIRGINIA STATUTES AUTHORIZED AND VALID

The statutes in question are a valid exercise of the police power and of the authority granted in the Constitution of West Virginia.

19

POLICE POWER

The liquor traffic is peculiarly subject to the police power of the State and there is no inherent right to engage in it, which may not be regulated, or prohibited. The Court decisions are uniform on this one proposition at least, that the liquor business is of a character so menacing to the public welfare that no person can claim an inalienable right to engage in it. No one can complain, if, having chosen this vocation, his business is regulated, or pro-

hibited, by law; whatever the property loss to him may be or whatever means is devised by the State to accomplish such regulation, or Prohibition, so long as such means are reasonable and necessary to affect the purpose designed.

Nowhere is the anomalous character of the liquor business, and the right of the State to deal with it, free from constitutional limitations, State and Federal, which protect other property interests, better stated and defined than in the so-called License cases in 5 Howard, 504. Chief Justice Taney at page 577 put the proposition thus:

"If any State deems the retail and internal traffic in ardent spirits injurious to its citizens and calculated to produce idleness, vice or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic or from prohibiting it altogether, if it thinks proper."

In *Beer Co. v. Mass.*, 97 U. S. 33, it was contended that since the adoption of the Fourteenth Amendment to the Federal Constitution the right to sell intoxicating liquors was secured to citizens in every State, but this Court of the United States swept such a claim aside with the remark that, "so far as such a right exists it is not one of the rights growing out of a citizenship of the United States."

In this same case the contention was made that while the Legislature might prohibit an individual from engaging in the manufacture and sale of intoxicating liquors, a corporation could not be so prohibited because of the contract with the State expressed in its charter. The Beer Company had been organized "for the purpose of manufacturing malt liquors in all their varieties," and insisted that this corporate power granted in their charter could not be taken away. Mr. Justice Bradley, delivering the opinion of the Court, said:

"The right to manufacture, undoubtedly as the plaintiff's counsel contends, included the identical right to dispose of the liquors manufactured, but al-

though this right or capacity was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor; nor as exempting the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the Legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State."

The fact is everywhere recognized that the liquor traffic is not to be treated as an ordinary, legitimate business entitled to equal protection with other pursuits. As the Court says in *State ex rel Judges*, 50 U. J. L., at page 595:

"The sale of intoxicating liquors has from the earliest history of our State been dealt with by the Legislature in an exceptional way. It is a subject by itself, to the treatment of which all analogies of the law appropriate to other topics cannot be applied."

This characterization of the liquor business "as a subject by itself," necessitating treatment by the Legislature "in an exceptional way" is everywhere to be found in the cases. The business of dealing in intoxicating liquors is universally recognized as a vocation suffered rather than favored by the State. To borrow an analogy from the law of torts, the liquor business is to be treated with the respect due to a trespasser upon the premises of society rather than with the care due an invited guest. The property of the saloonkeeper cannot be wantonly or unnecessarily destroyed, nor can arbitrary or needless discrimination be made among or between those engaged in this pursuit; but everything short of this can be lawfully done which the legislative power deems wise and expedient in lessening or eradicating the evils of this commerce.

Well and forcibly did the former Chief Justice of the Supreme Court of the United States put this proposition.

In *Giozza v. Tiernan*, 148 U. S. 657, Mr. Chief Justice Fuller says, at page 61, in speaking of the constitutionality of laws regulating the sale of liquors in Texas:

"The privileges and immunities of citizens of the United States are privileges and immunities arising out of the nature and essential character of the national Government, and granted or secured by the Constitution of the United States, and the right to sell intoxicating liquors is not one of the rights growing out of such citizenship. The amendment (Fourteenth) does not take from the States their powers of police that were reserved at the time the original Constitution was adopted. Undoubtedly it forbids any arbitrary deprivation of life, liberty or property, and secures the equal protection to all under like circumstances in the enjoyment of their rights; but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens, and to protect their health, morals, education and good order."

Here we have a clear statement going to the very fundamentals in defining the limit, if any there be, to the exercise of that power residing in every State to guard against the evil of a traffic which menaces the health, the morals and the safety of the people. Of course, a State Constitution may restrict the exercise of the police power in any direction, or may express more clearly the freedom from such restrictions. But so far as a uniform rule can be stated it is to the effect that the business of dealing in intoxicants as a beverage is one having no inherent or inalienable rights; it is one for which no constitutional guaranties were written, and is to be protected only in case the legislative authority attempts in a pretended exercise of the power to regulate or prohibit it, to needlessly destroy property or arbitrarily discriminate between those against whom its power is directed.

DECISIONS FROM MANY COURTS SUSTAIN THE
VIEW THAT THE CHARACTER OF THE
LIQUOR TRAFFIC IS SUCH THAT IT CAN-
NOT INVOKE THOSE CONSTITUTIONAL
GUARANTIES WHICH PROTECT OTHER
PERSONAL AND PROPERTY RIGHTS.

Decisions without number and from practically every jurisdiction in this country could be cited to support the general principles we contend for herein. We cite a few of the more important, going particularly to the proposition that the liquor business is peculiarly within the police power; that there is no right to engage in it which is protected by constitutional limitations; that it can not claim the inviolability of property or the equal protection of the law in the same sense that personal, political and property rights generally invoke it, and finally that there is no limit to the measures that may be devised to mitigate this evil or destroy it altogether, so long as such measures are designed to accomplish that purpose only and treat all alike who are alike engaged in the unwholesome trade.

- Foster vs. Kansas, 112 U. S. 201, 28 L. Ed. 629.
Boston Beer Co. vs. Mass., 97 U. S. 25, 24 L. Ed. 989.
Mugler vs. Kansas, 123 U. S. 623, 31 L. Ed. 205.
Kidd vs. Pearson, 168 U. S. 1.
Crowley vs. Christensen, 137 U. S. 91, 34 L. Ed. 620.
Goddard vs. The Town of Jacksonville, 15 Ill. 589.
Our House No. 2 vs. The State, 4 Freem. (Iowa).
172; Beebe vs. State, 6 Ind. 542.
State ex rel. vs. Crawford, 42 American Reports, 186.
Thurlow vs. Commonwealth of Mass., 5 Howard, 504.
State vs. Kansas, 80 Pacific, 987.
Crowley vs. Christensen, 137 U. S. 86.
Santo et al vs. State, 2 Iowa, 165-190.

CONSTITUTION OF WEST VIRGINIA FURTHER ELUCIDATES POLICE POWER

In 1912 the people of West Virginia adopted the following amendment to their constitution:

"On and after the first day of July, one thousand nine hundred and fourteen, the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, ale, porter, beer or any intoxicating drink, mixture or preparation of like nature, except as hereinafter provided, are hereby prohibited in this state. Provided, however, that the manufacture and sale, and keeping for sale of such liquors for medicinal, pharmaceutical, mechanical, sacramental, and scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes may be permitted under such regulations as the Legislature may prescribe. The Legislature shall, without delay, enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section."

In addition to the police power of the State, this amendment to the Constitution makes clear the purpose of the sovereign people of West Virginia. The manufacture, sale and keeping for sale of all liquors for beverage purposes is prohibited. The sale for medicinal, pharmaceutical, mechanical, sacramental, scientific and industrial purposes may be authorized by the Legislature. The General Assembly cannot, however, permit the beverage traffic or distribution. If the people of West Virginia are rightly prevented from selling liquor for personal use or from manufacturing it for personal use for beverage purposes, it logically follows that no one in that State has any inherent or legal right to have it sold, or manufactured for their own use as a beverage. In enforcing this provision of the Constitution, laws were passed preventing the sale, furnishing and giving away of intoxicating liquor as a beverage. All so-called soft drinks which are commonly used as a subterfuge in the distribu-

tion of liquor were prohibited; solicitation was prohibited. A law was enacted making the place of delivery the place of sale, and also to prohibit persons from receiving or having in their possession intoxicating liquors received from a common carrier. All of these laws were enacted for the sole purpose of making effective the provisions of the new constitution.

IF A STATUTE PURPORTING TO BE PASSED TO PROTECT PUBLIC HEALTH, PUBLIC MORALS, PUBLIC SAFETY, AND PUBLIC WELFARE HAS REAL AND SUBSTANTIAL RELATION TO THOSE OBJECTS, IT IS A PROPER EXERCISE OF THE POLICE POWER, AND THE COURTS HAVE BEEN LIBERAL IN SUSTAINING SUCH STATUTES.

Mugler vs. Kansas, 123 U. S. 623, 660, 31 L. Ed. 205, 210 8 Sup. Ct. Rep. 273; *Plumley vs. Mass.*, 155 U. S. 461, 39 L. Ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Powell vs. Penn.* 127 U. S. 678, 32 L. Ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Slaughterhouse Cases*, 16 Wall, 36, 21 L. Ed. 394.

This same rule has been followed in construing statutes under the police power prohibiting the liquor traffic. In *Lincoln v. Smith*, 27 Vt. 320, at 337, the Court said:

"The primary object and end of the law is the prevention of intemperance, pauperism and crime; and the prohibition of the traffic is but the medium through which the object and end of the law is to be attained."

Marks vs. State, 155 Ala. 71.

"The evil to be remedied is the use of intoxicating liquors as a beverage * * * and the object of the law under this principle must not be lost sight of in its interpretation."

See also *State vs. Delaye*, 68 Southern 995, ex parte *Crane*, 151 Pac. Rep. 1006; also *State vs. Maine*, 20 L. R. A. 496; *Purity Extract Co. vs. Lynch*, 226 U. S. 201.

DO THE WEST VIRGINIA STATUTES HAVE A
REASONABLE RELATION TO THE PURPOSE
SOUGHT TO BE ACCOMPLISHED?

Both the Constitution and the State laws prohibit the sale and distribution of intoxicating liquor, as above set forth. These laws were enacted under the Constitution and the police power of the State to protect public morals and promote the public good. The real purpose of these laws is to prevent and discourage the use of intoxicating liquor as a beverage, because it is hurtful to the individual and the community. In order to accomplish the purpose, laws had to be enacted to prevent liquor dealers from outside the State from sending the deleterious commodity into the State. Opposing counsel do not claim there is any lack of authority to prevent this distribution or use within the State, but denies that either the State or the Federal legislative power may prevent its shipment for personal use from without the borders of the State.

Congress has enacted the law to give relief so far as a Federal Government is responsible for these shipments through the agencies of interstate carriers. The state has supplemented this legislation by enacting laws authorized under the Constitution and police power of the State. The laws prohibiting possession or reception of liquor as a beverage were enacted to carry out the purpose authorized in the Constitution of West Virginia. The law making the place of delivery the place of sale has a vital relation to the end to be sought by this legislation. Mr. Blue in his brief has presented fully the reasons and authority for sustaining this provision of the law.

RECEIPT AND POSSESSION OF LIQUOR FROM A
COMMON CARRIER

The State not only has the right to prohibit certain acts, but also the right to prohibit the possession of the

instrument for accomplishing those prohibited acts, even though such instruments may be harmless in themselves. This principle was established in the case of *Patson v. Pennsylvania*, 232 Sup. Ct. Rep., page 138.

In this the purpose of the statute was to protect game for food supply. The law was sustained which prevented unnaturalized citizens from shooting such game or having in their possession certain firearms by means of which they might shoot such game.

The Court said in discussing this question:

"The discrimination undoubtedly presents a more difficult question. But we start with the general consideration that a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named." *Lindsley vs. National Carbonic Gas Co.*, 220 U. S. 61, 80, 81, 55 L. Ed. 369, 378, 379, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912 C. 160. The State "may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses." *Central Lumber Co. vs. South Dakota*, 226 U. S. 157, 160, 57 L. Ed. 164, 169, 33 Sup. Ct. Rep. 66; *Rosenthal vs. New York*, 226 U. S. 260, 270, 57 L. Ed. 212, 216, 33 Sup. Ct. Rep. 27; *L'Hote vs. New Orleans*, 177 U. S. 587, 44 L. Ed. 899, 20 Sup. Ct. Rep. 788. See further *Louisville & N. R. Co. vs. Melton*, 218 U. S. 36, 54 L. Ed. 921, 47 L. R. A. (N. S.) 84, 30 Sup. Ct. Rep. 676. "The question, therefore, narrows itself to whether this Court can say that the Legislature of Pennsylvania was not warranted in assuming as its premise for the law that resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent." Bar-

rett vs. Indiana, 229 U. S. 26, 29, 57 L. Ed. 1050, 1052, 33 Sup. Ct. Rep. 692.

"Obviously the question, so stated, is one of local experience, on which this Court ought to be very slow to declare that the State Legislature was wrong in its facts."

It is manifest that the means for accomplishing the purpose of a constitutional amendment must be construed with a great deal of latitude, and the body which is best equipped to determine how far the State should go, is the Legislature itself. The chief obstacle in the enforcement of law in a prohibition State is the common carrier. Through the means of such common carrier attempt is made to furnish liquor to the people, just as was formerly done through the saloon. If this is permitted and as much liquor should be consumed by the people, then there would be little or no advantage in the passage of the prohibition laws.

In order to prevent this agency of distribution, the Legislature decided that the most effective means was to prevent the possession or receipt of liquor from a common carrier. All carriers are treated alike, both inter and intra-state carriers.

This statute not only has a reasonable relation to the purpose to be accomplished, but is a necessary aid in the reasonable enforcement of the law. If any person is permitted to receive the liquor and possess it from a common carrier, it ~~forms~~^{becomes} an unnecessary burden upon the officer of the law to watch the individual until an overt act of lawlessness is committed. To make law enforcement hard is not the function of government or the proper construction to be placed upon statutes intended for the public good.

We have already established in another part of this brief that no individual has any constitutional right to possess liquor for beverage purposes. If he has no right to possess liquor for this purpose, it then follows that the Legislature may prohibit him from receiving such liquor

from any agency which may be used as an easy means to accomplish the violation of the law.

If a foreigner may be prevented from having a shotgun because it is a means by which he would kill game, certainly the act in question in this statute may be prohibited without even approximating the length to which this Court went in upholding the Pennsylvania statute.

The power now residing in the State is clearly set forth in the case of *Southern Express Company vs. Whittle*, Southern Reporter 652:

The Webb-Kenyon law "prohibits the shipment or transportation of liquor from one State into another, not only when it is intended to be sold in violation of any law of such State, but when it is to be received or possessed, or in any manner used in violation of the State law."—*State of West Virginia vs. Adams Express Co.*, supra. "There is nothing in the Webb-Kenyon law to indicate any intention to restrict its beneficent and considerate effect to only those cases where total prohibition, with respect to the sale, receipt or possession of intoxicating liquors, is the statutory status in a State. The dominant idea in the law is to deny the privilege and protection of lawful interstate commerce to the instrument of intended violation of any valid State law affecting the use, possession, receipt, etc., of intoxicating liquors. The plain terms of the statute inhibit any right to enter intoxicants in interstate commerce where the purpose is unlawful."

The State is now free to exercise its police power to the extent of prohibiting either the possession, or receipt, of intoxicating liquors. These are the incidents leading to its use which will produce the evil sought to be remedied.

The Supreme Court of Idaho in discussing this point said with reference to the statute in that State: 151 Pac. Rep. 1006:

"The only means provided by the act for procuring intoxicating liquors in a prohibition district for any purpose relates to wine to be used for sacramental purposes and pure alcohol to be used for

scientific or medicinal purposes, or for compounding or preparing medicines so that the possession of whisky or any intoxicating liquor other than wine and pure alcohol for the uses above mentioned, is prohibited."

The Court further said:

"Does the statute purport to have been enacted to protect the public health and public morals and public safety? Has it a real and substantial relation to those objects, or is it on the other hand a palpable invasion of rights secured by the constitution? Questions as to the wisdom and expediency of such legislation, address themselves to the legislative and judicial branch of the government. * * *

"Probably the author of none of these opinions would hesitate in holding that the sale of intoxicating liquor may be prohibited as a legitimate exercise of the police power, and that such a law would not abridge any of the privileges or immunities of the citizens in such a way as to violate any constitutional provision. Still it must be admitted that, if the possession of such liquor 'can by no possibility injure or affect the health, morals or safety of the public,' the sale is equally harmless; for it only transfers the possession from one person to another. The fact is that the harm consists neither in the possession nor sale, but in the consumption of it. That is the evil which the people of Idaho, acting through the Legislature, are trying to eradicate, and since 'it will not require any elucidation to show that, if the citizen may be prohibited from having liquor in his possession, he can be prohibited from drinking it, because of necessity, no one can drink that which he has not in his possession;' and since that great difficulty has been encountered in enforcing the prohibitory laws the statement made by the learned jurist in the case of *Mugler vs. Kansas*, supra, relative to the manufacture of intoxicating liquors for the maker's own use, as a beverage might well be said with respect to its possession, which would make it read:

"And so if, in the judgment of the Legislature the manufacture of intoxicating liquors * * * would tend to cripple, if not defeat, the effort to guard the community against the evil attending the excessive

use of such liquors, it is not for the Courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question."

The Court reasons directly to the point in showing what the purpose of this legislation is and then concluding that the statutes in question were intended to help aid in the execution of those statutes.

A STATE HAS A RIGHT TO CLASSIFY SUBJECTS FOR THE PURPOSE OF EXERCISING THE POLICE POWER.

Louisville & N. R. Co. v. Melton, 218 U. S. 36, L. Ed. 921, 47 L. R. A. (N. S.) 84, 30 Sup. Ct. Rep. 676; Mager v. Grima, 8 How. 490, 12 L. Ed. 1168; Magoun v. Ill. Trust & Sav. Bank, 170 U. S. 283, 42 L. Ed. 1037, 18 Sup. Ct. Rep. 594; Barbier v. Connolly, 113 U. S. 27, 28 L. Ed. 923, 5 Sup. Ct. Rep. 357; Missouri v. Lewis (Bowman v. Lewis), 101 U. S. 22, 25 L. Ed. 989; Owen County Burley Tobacco Soc. v. Brumback, 128 Ky. 141, 107 S. W. 710; St. Louis I. M. & S. R. Co. v. State, 86 Ark. 518; 112 S. W. 150; Badenoch v. Chicago, 222 Ill. 71, 78, N. E. 31; Com. use of Titusville v. Clark, 195 Pa. 634, 57 L. R. A. 348, 86 Am. St. Rep. 694, 46 Atl. 286; Trageser v. Gray, 73 Md. 250, 9 L. R. A. 780, 25 Am. St. Rep. 587, 20 Atl. 905; Com. v. Hana, 195 Mass. 262, 11 L. R. A. (N.S.) 799, 122 Am. St. Rep. 251, 81 N. E. 149, 11 Ann. Cas. 514; Slaughter-house Cases, 16 Wall. 36, 21 L. Ed. 394; Kidd v. Pearson, 128 U. S. 1, 32 L. Ed. 236, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; McCready v. Va. 94 U. S. 391, 24 L. Ed. 248.

Classification may be properly based upon the "degree of evil" designed to be remedied.

Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 52 L. Ed. 236, 28 Sup. Ct. Rep. 114; Engel v. O'Malley, 219 U. S. 128, 55 L. Ed. 128, 31 Sup. Ct. Rep. 190; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. Ed. 415, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; Chicago Dock & Canal Co. v. Fraley, 228 U. S. 680, 686, 57 L. Ed. 1022, 1024, 33 Sup. Ct. Rep. 715.

In the exercise of the police power there is no limitation on the classification of objects affected so long as there is no arbitrary or unreasonable classification.

As Justice Fuller said in the case of *Giozza vs. Tierman*, 148 U. S. 657:

"The amendment (Fourteenth) does not take from the States their powers of police that were reserved at the time the original Constitution was adopted. Undoubtedly it forbids any arbitrary deprivation of life, liberty or property, and secures the equal protection to all under like circumstances in the enjoyment of their rights; but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens, and to protect their health, morals, education and good order."

THE WEST VIRGINIA STATUTES PROVIDE REASONABLE CLASSIFICATION IN THEIR PROHIBITION.

The laws of West Virginia relating to the shipment of liquor into the State deal with agencies which are in a class by themselves. The man who attempts to manufacture liquor in the State is penalized by the laws prohibiting the manufacture for beverage purposes. If he purchases the liquor from an illegal manufacturer and attempts to distribute it, the law prevents this.

The one great source of distribution of liquor came through the common carrier and it is a natural classification to prohibit the receipt or possession of intoxicating liquor from this agency.

One of the objections raised to this kind of legislation is stated in Freund on Police Power, section 738, "Where a restraint is confined to a special class of acts or occupations, that class must present the danger dealt with in a more marked and uniform degree than the classes omitted." The statement of this objection makes clearer than ever the reasonableness of the legislation in question. The special danger confronted in West Virginia was the shipment

of liquor through the channels of commerce. The State could only prohibit acts within her jurisdiction. The sale, furnishing and manufacture of liquor was prohibited. The next step for the State was to prohibit the possession and receipt of liquor from these agencies which aided law-breaking from without the borders of the State.

The receipt and possession of liquor from other agencies than common carriers are taken care of by other laws. The laws in question are simply part of a system of legislation intended to prevent and discourage the sale, furnishing and use of intoxicating liquor as a beverage.

TRANSACTIONS ACCESSORY OR INCIDENTAL TO
BRINGING LIQUORS INTO THE STATE AND
THE DISPOSITION OF THEM MAY BE
PROHIBITED.

The proposition is well settled that any transaction which is incidental to an unlawful business may be prohibited. This is not only another phase of the principle applied by this Court in the case of the Purity Extract Co. vs. Lynch, *supra*, where it was held that an innocent act may be prohibited, if it is necessary, in preventing an evil which may be properly inhibited. That such incidental transaction may be prohibited was settled in the case of *Delameter vs. South Dakota*, 10 Am. Eng. Anno. 733.

Before the passage of the Webb-Kenyon law this case was sustained under a statute which prohibited the soliciting of orders for liquor even though the place where the order was filled and completed was outside the State. The Court sustained the law on the theory that the transaction was accessory or incidental to the business of bringing liquors into the State and disposing of them in violation of the State law.

Unless such a rule is followed in construing and sustaining State laws, those who desire to violate law would receive great encouragement. As a rule Courts have recog-

nized this fact and have sustained statutes which prevented these transactions, which are incidental to the unlawful acts. In doing this some innocent acts may be included, but this inconvenience cannot be used as a valid objection to a statute which was intended to promote the public good and to help in the enforcement of law for that end.

The Supreme Court of North Carolina in the recent case of *Glenn vs. Southern Express Co.*, states this proposition as follows:

"The State has declared that intoxicating liquors shall not be sold or manufactured within the State, and one of the principal difficulties in the enforcement of this law is the impossibility of distinguishing between liquors brought into the State for use and those introduced to sell and the bringing in of such liquors under the pretense of being for personal use, when they are intended for sale, has been such a prolific source of evasion of the prohibition law that restrictions upon the arrival or delivery in the State are necessary to prevent illicit sales."

This is a concise statement of the facts which the officers of the law face in Prohibition territory. Wherever any means are provided for the introduction of liquor for purposes which result in little harm, this very means is used by the liquor interests to break down the main purpose of the law. Consequently, the States have been compelled to prohibit these acts which represent the lesser evil in order to prevent the greater. In practically every instance those who complain about these statutes are the ones who are responsible by their lawlessness for their enactment. If the liquor interests from outside the State of West Virginia had respected the sovereign will of the people of that State, many of these laws probably would never have been enacted. It became necessary in order to carry out the policy of the State and to secure a reasonable enforcement of the organic and statute law, to enact these provisions—making the place of delivery the place of sale, and prohibiting receipt and possession of liquor from common carriers.

LEGISLATIVE POLICY OF WEST VIRGINIA SUSTAINED BY ITS SUPREME COURT.

When this case was before this Court on the original hearing, it was claimed that the Supreme Court of West Virginia would not sustain the statutes in question. Since the former hearing the Supreme Court of West Virginia has modified, and virtually reversed the decision in the Gilman case, or at least the construction placed upon that decision by opposing counsel. This has been referred to in a former part of this brief.

In the two decisions recently handed down by the Supreme Court of West Virginia, the position of that Court is made clear. The first case was entitled *State vs. Davis*, No. 2864, which involved the law which prohibits soliciting or receiving orders for liquor, which is section 3 of the Yost law, and section 8, which makes it unlawful to advertise such liquors for sale. The Court, after citing the case of *Delameter vs. South Dakota*, 10 Am. & Eng. Anno. 733; *Hooper vs. California*, 155 U. S. 648; *Williams vs. Fears*, 179 U. S. 270; *Rearick vs. Pennsylvania*, 203 U. S. 507, said:

"But in the face of these federal decisions how are these provisions of the statute to be applied to interstate business, or to transactions originating outside of the State? It is insisted, of course, that they fall at once under the protecting aegis of the Wilson Act, or if not so, that they come under the protection of the Webb-Kenyon law. The case of *Delameter v. South Dakota*, supra, is a direct decision that a local statute regulatory of the business of soliciting orders for liquor located in another State is valid when applied to one personally present in this State and engaged in the inhibited business. This upon the ground that such transaction is accessory or incidental to the business of bringing liquors into the state and there selling or otherwise disposing of them in violation of the local statute, and that any other construction of the Wilson Act would at least violate the spirit of that statute, and render the state

helpless in the enforcement of its local statutes intended to be protected by that act." * * *

"The Delameter case is not a direct decision on the specific point involved in this case. But anti-advertising liquor laws, like the one involved here, generally, have been held valid when applied to interstate transactions. *State v. Delaye* (Ala.), 68 So. 993. Defendant was not personally or by agent in the State doing the things inhibited by statute; he made use of the United States mails to accomplish his purposes, and to do what, if present personally or by agent, he could not lawfully have accomplished." * * In *R. M. Rose Co. v. State*, 133 Ga., 353 65, S. E. 770, 36 L. R. A. (N.S.), 443, reversing the judgment of the lower court, it was distinctly decided that an indictment charging defendant with use of the mails in soliciting orders by means of advertising literature substantially as shown in this case constituted no offense under the penal code of that State. But as suggested in the note to this case, as reported in the 36 L. R. A. *supra*, while the Delameter case may not be a direct decision on the powers of the State to regulate or prohibit the business of advertising or soliciting orders in the manner attempted in the Yost Law, that case nevertheless destroys any affirmative support against the existence of that power which might otherwise be derived from the earlier cases referred to.

"It must be conceded that soliciting orders by means of advertisements, if resulting in a sale of liquors located outside of the State, although incidental thereto, would constitute a part of such sale, and that if prior to the Wilson Act, such soliciting would have been protected as interstate commerce, for unless a part of such commerce, how could such personal solicitation and receipt of orders for liquors, prior to that act, have been brought under the protection of the Federal Constitution and protected thereby? Whether solicited by personal presence in the State, or by the use of the United States mails, the effect of the transaction with respect to the local statute would necessarily be the same.

"Did the use of the mails by defendant in the manner shown constitute an offense under our statute? Federal protection to the liquor traffic having

been withdrawn by the Wilson Act and the Webb-Kenyon Act, we think our statute covers the case presented by the pleadings and proof in this case. Use of the mails is not prohibited by the statute, but the business of soliciting orders by means of circulars, etc., is prohibited. It seems but a short step from the act of being personally present and soliciting orders or distributing advertisements to the doing of the same thing by the agency of the United States mails. We do not think a good ground of distinction can be suggested. Of course the object to be accomplished could not be attained except by delivery of the matter to prospective customers, but this end could as well be reached by the use of the mails as by the physical presence of the absent dealer in the State. * * *

"As interpreted in the Delameter case, the Wilson act removed all Federal restraint upon the States in regulating the soliciting of orders for liquor to be imported and delivered to the consignee in violation of local statutes. And as applied to actual shipments of liquor, the Supreme Court in *Rhodes v. State of Iowa*, 179 U. S. 412, and in *Re Rahrer*, 140 U. S. 545, decided that the word 'arrival,' employed in the Wilson Act, meant actual delivery of the liquor to the consignee, and that until then the State statute could not become operative upon an interstate shipment. Chief Justice Clark, in his concurring opinion in *State v. Cardwell* (N. C.), 81 S. E. 628, 630, referring to the cases just cited, says: 'In this latter case, however, Chief Justice Fuller, speaking for the Court, says: 'No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency so to do.' Upon this hint, Congress acted by passing the Webb-Kenyon law which does so divest intoxicating liquors of their interstate character at the earliest period of time, that is, upon delivery to the carrier. In the same case Chief Justice Fuller further says: 'Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the State laws in respect to imported

packages in their original condition, created by the absence of a specific utterance on its part.' Congress in the Webb-Kenyon law acted upon this hint also and provided for the application of that statute to intoxicating liquor 'which is intended by any one interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of this State.'

"We think Judge Clark's interpretation of the Webb-Kenyon Act, though thought by the majority not to be involved in that case, has substantial foundation in the history of the Federal legislation referred to. The Webb-Kenyon Act, in terms, is limited to the shipment or transportation of intoxicating liquors, and to liquors intended by any person interested therein to be received, possessed, sold, or in any manner used either in the original package or otherwise, in violation of the State statute. * * *

"A statute prohibiting soliciting of orders by means of such circulars or other advertisements, the offence of which defendant was found guilty, is certainly within the spirit and policy of the statute to prohibit the sale and manufacture of intoxicating liquors. And the carrying of such liquors into the State by a common carrier would be in furtherance of the unlawful purposes of those violating the statute.

"Again, if orders should be obtained by means of circulars, or other advertisements inhibited by the statute, and result in a sale and delivery of liquors within the State, such sale would be a violation of the statute and be covered by the Webb-Kenyon statute.

"So we conclude, in view of the interpretation of the Wilson Act, that this latest Federal statute supplementing that act has so far removed restrictions upon State action as to validate the provisions of the Yost Law in question, and that the defendant is guilty as charged."

The Supreme Court of West Virginia further expressed its views with reference to these statutes in the case of *State vs. Sixo*, No. 2895. This case involved a violation of Section 31 of the West Virginia statutes which provided, that:

"It shall be unlawful for any person to bring or carry into the State, or from one place to another within the State, even when intended for personal use, liquors exceeding in the aggregate one-half of one gallon in quantity, unless there is plainly printed, or written on the side or top of the suit case, trunk or other container in large, display letters in the English language, the contents of the container or containers and the quantity and kind of the liquors contained therein."

In sustaining the validity of this statute the Court said:

"But it is insisted by counsel for plaintiff in error that said section 31 of chapter 7, of the acts of the Legislature of 1915, is unconstitutional and void. Counsel argues at great length to prove that the Legislature could pass no valid act making it an offense for a person to have in his possession liquors, unless for some improper purposes. * * *

"The case of *State v. Gilman*, supra, is authority for the proposition that a statute prohibiting the keeping of liquors by one person for another, without a State license therefor, is unconstitutional and void, under the Constitution then in force; but it does not follow that the Legislature in the exercise of the police power, may not provide reasonable regulations as to the conditions upon which intoxicating liquors may be brought into the State or carried from one place to another within the State.

"Since the case of *State v. Gilman* was decided, the Constitution of the State has been amended. The Constitution as amended prohibits the manufacture and keeping for sale of malt, vinous and spirituous liquors, etc., and requires the Legislature to 'enact such laws with regulations, conditions, securities and as may be necessary to carry into effect the provisions of this section.'

"This amendment became effective July 1, 1914.

"It is the duty of the Legislature to enact such laws as may be necessary to make effective this provision of the Constitution as amended. The Legislature, responsive to this requirement of the Constitution, has deemed it wise to require liquors brought into the State, or carried from one place to another within the State, in quantities of one-half gallon or

more, to be marked or labeled. Whether or not this is a wise policy is not for the Courts to determine. If the Legislature has not exceeded its powers, the Courts cannot interfere. The Courts may decide whether or not the Legislature had the power to establish these regulations, but they cannot prescribe the policy, if within the legislative limits; this would be to subordinate the will of the Legislature to the opinion of the Courts."

"In a well considered case of Purity Extract and Tonic Co. v. Lynch, 226 U. S. 192, Mr. Justice Hughes wrote a very able opinion and said:

"It is also well established that, when a State exercising its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous, that it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government."

"We are clearly of the opinion that the portion of said section 31, now under consideration, is within the legislative power."

It is manifest from these decisions that the Supreme Court of West Virginia upholds the doctrine in construing their own constitution as set forth in the Purity Extract Co. vs. Lynch case. Under this far-reaching and wise decision, even innocent acts may be prohibited when they are used as aids to the violation of laws enacted under the police power. It is certainly manifest to any public officer, who has had any experience in enforcing laws against the liquor traffic, that the statutes in question are necessary in order to have a reasonable enforcement of the prohibition laws of West Virginia.

If a liquor dealer from Baltimore, Cincinnati or Louisville, Ky., can reach over into West Virginia and by an express company, or railroad, distribute liquors in this way, a great benefit to be attained by the prohibitory law will be destroyed. As has been repeatedly held by the many State

Supreme Courts, the purpose of all these laws is to discourage and prevent the use of liquor. If as much liquor is to be used in a State after prohibition as before, it will then be admitted that the purpose of the law is a failure. We do not believe that any such construction is made necessary by the provisions of either the State or Federal Constitution.

The Supreme Court of West Virginia also enunciates the doctrine that any transaction which is accessory, or incidental to the bringing of liquors into the State to be disposed of in violation of law, may be prohibited. This doctrine, also, is sufficient to sustain the laws in question. If liquor may be delivered into West Virginia and the State cannot prevent any person from having it or possessing it, the enforcement of the statute is made unreasonable and difficult and the law-breaking liquor interests would be encouraged to increase their efforts in breaking down the remaining statutes intended to curb this well-recognized evil. The receiving of the liquor and the possessing it and delivering it into the State are all incidents to the acts which the State has legally prohibited. As has been said repeatedly by the Courts of last resort in cases cited, it is not the sale of liquor that injures the purchaser; it is not the possession of it primarily that injures the purchaser, **but the use of the liquor**, and all of these acts, the sale, possession and receipt, are but a means of placing the liquor where it will do harm. Consequently, the same reasoning which sustains the law prohibiting the sale of liquor should sustain the law which prohibits the receipt, or possession of the liquor.

The length to which the State will go in prohibiting these means which encourage the use, is a matter for legislative discretion. In the evolution of the race and the development of a higher civilization, these steps will be taken in response to growing public sentiment upon this question.

To deny the State the right to enact such laws would thwart the fundamental purpose of our government to pro-

mote the general welfare and safeguard public morals and the public good. The Supreme Court of West Virginia has laid down the principles by which it will be guided in construing these laws and we do not believe that this Court can justly interfere with these decisions, so clearly intended to aid the enforcement of law and promote the public welfare.

Statutes, which help to make men sober and patriotic, which result in reducing crime and degeneracy and which make possible the enforcement of law, must be valid, if our form of government is to endure.

We respectfully submit that the decree of the lower Courts should be sustained.

W. B. WHEELER,
Of Counsel for the State of West Virginia.



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JAMES D.

**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1915.

25-76
No. 383.

THE JAMES CLARK DISTILLING COMPANY,
Appellant,

VS.

**THE WESTERN MARYLAND RAILWAY COMPANY
AND THE STATE OF WEST VIRGINIA.**

No. 384.

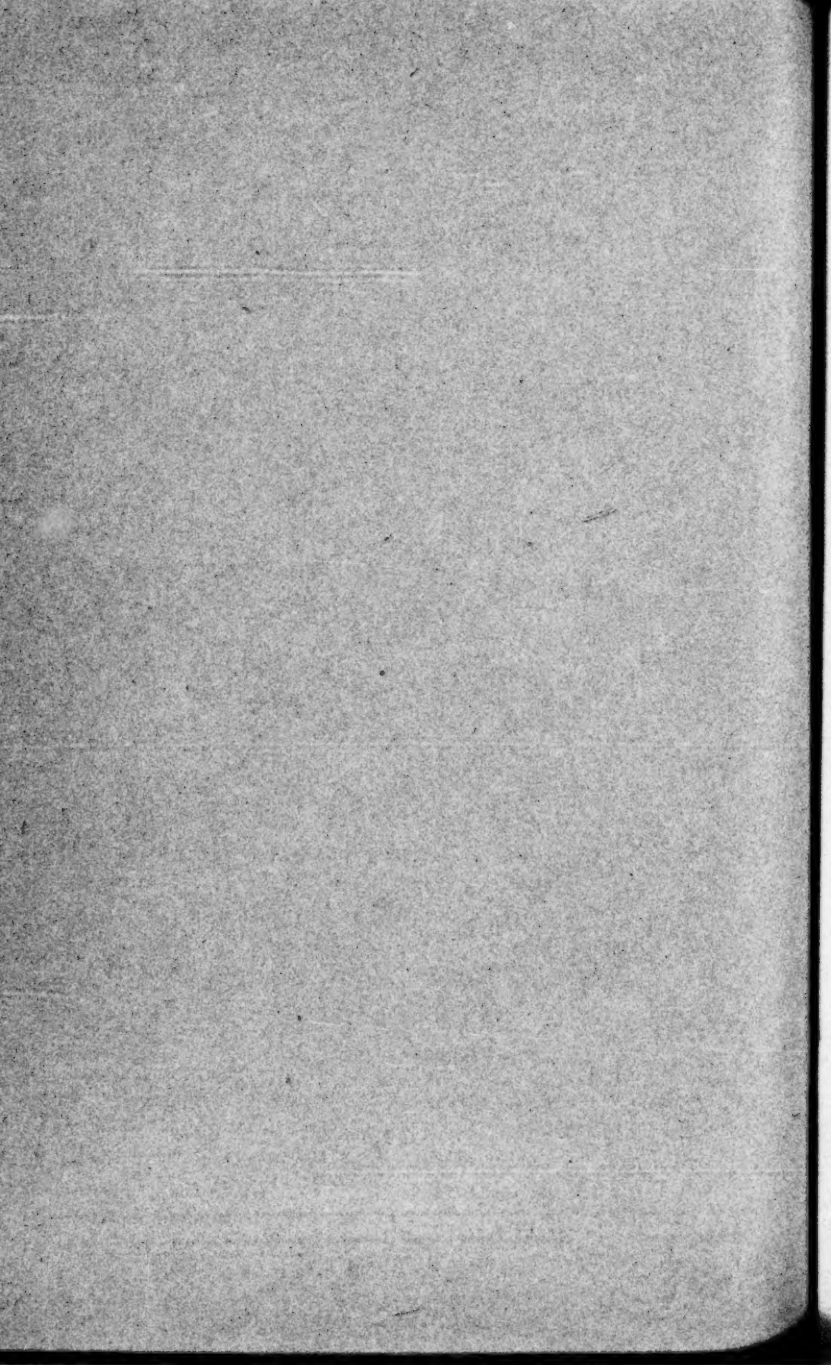
THE JAMES CLARK DISTILLING COMPANY,
Appellant,

VS.

**THE AMERICAN EXPRESS COMPANY AND THE
STATE OF WEST VIRGINIA.**

**APPEALS FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT
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Brief filed by permission of the court, on behalf of the State of West Virginia, appellee, by the Attorneys-General (as amici curiae) of the several states as shown at the end of the brief.



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October Term, 1915.

No. 383.

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the end of the brief.

(Italics in this brief supplied.)

Briefs have been or will be filed by counsel for the State of West Virginia, stating the case as presented by the record, and dealing with the West Virginia Statutes and the West Virginia Prohibition Amendment, effective July 1st, 1914.

We propose to confine ourselves to the maintaining of two propositions:

(1) The Webb-Kenyon Act is valid.

(2) The State of West Virginia, under the police power, may validly prohibit or regulate the receipt and the possession of intoxicating liquors within its borders; and nothing in its state constitution as amended, nor in the 14th Amendment to the Federal Constitution, nor in the "commerce clause" since the Webb-Kenyon Law, will prevent it from exerting its police power in the manner stated, although the liquors are for personal use.

Preparatory to the discussion of these propositions, it is desirable to set forth said state Prohibition Amendment, and to refer to the several West Virginia statutes that are considered or mentioned in the briefs of the parties to the causes, respectively.

WEST VIRGINIA PROHIBITION AMENDMENT.

At the general election in 1912 the following Amendment to the Constitution was ratified by the people of West Virginia, to take effect July 1st, 1914:

"On and after the first day of July, one thousand nine hundred and fourteen, the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, ale, porter, beer, or any intoxicating drink, mixture or preparation of like nature, except

as hereinafter provided, are hereby prohibited in this state. Provided, however, that the manufacture and sale and keeping for sale of such liquors for medicinal, pharmaceutical, mechanical, sacramental, and scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes may be permitted under such regulations as the legislature may prescribe. The legislature shall, without delay, enact such laws, with regulations, conditions, securities, and penalties, as may be necessary to carry into effect the provisions of this section."

STATUTES OF WEST VIRGINIA.

The bill as filed drew in question sections 1, 2, 3, and 4, of the Yost Law of February 11, 1913, effective July 1, 1914, and particularly the following provision of section 3:

"And in case of a sale in which a shipment or delivery of such liquors is made by common or other carrier, sale thereof shall be deemed to be made in the county where the delivery thereof is made by such carrier to the consignee his agent or employee."

On the former argument in this case there was called to the attention of the Court by counsel for the State of West Virginia, the following provision of Amended section 7 of the West Virginia law, approved February 5, 1915, to take effect thirty days from its passage:

"And provided further that no common carrier for hire, nor other person for hire or without hire, shall bring or carry into this state, or carry from one place to another within the state, intoxicating liquors for another, even when intended for personal use; except a common carrier may, for hire, carry

pure grain alcohol, wine, or such preparations as may be sold by druggists for the special purposes and in the manner set forth in sections 4 and 24."

After the submission and former argument of these causes, counsel for the appellant, James Clark Distilling Company, called to the attention of this Court, a statute of West Virginia enacted May 24th, 1915, effective August 22nd, 1915, as follows:

"Sec. 34. It shall be unlawful for any person in this state to receive, directly or indirectly, intoxicating liquors from a common or other carrier. It shall also be unlawful for any person in this state to possess intoxicating liquors, received directly or indirectly from a common or other carrier in this state. This section shall apply to such liquors intended for personal use, as well as otherwise, and to interstate, as well as intrastate, shipments or carriage. Any person violating this section shall be guilty of a misdemeanor and upon conviction shall be fined not less than one hundred dollars nor more than two hundred dollars, and in addition thereto may be imprisoned not more than three months; provided, however, that druggists may receive and possess pure grain alcohol, wine and such preparations as may be sold by druggists for the special purpose and in the manner as set forth in sections four and twenty-four."

Counsel for appellant thereupon made the following suggestion to the Court in reference to said amended section 34:

"As the purpose of these suits is to compel the defendants to carry interstate shipments of liquor into West Virginia for the personal use of the con-

signees, the form of the decree will depend upon the state of the law of West Virginia at the time the decree is entered. At pages 15-17 of the brief for the State of West Virginia it was contended that the amendment of section 7 in January, 1915, had the effect of rendering moot our claim that section 3 of the law was not intended to apply to interstate shipments for personal use, and it will doubtless now be contended that interstate shipments of intoxicating liquors for personal use are absolutely prohibited by the amendment of May 24, 1915, and that such prohibition is authorized by the Webb-Kenyon Law.

"We submit that the amendment of May 24, 1915, is in contravention of the "commerce clause" of the Constitution of the United States, as a direct regulation of interstate commerce, beyond the power of the State of West Virginia either under the supposed authority of the Webb-Kenyon Law or otherwise; and also that it is in contravention of the Fourteenth Amendment for the reasons stated in our reply brief."

PURPOSE OF THIS BRIEF.

It is the purpose of this brief to take issue with the suggestion of appellant's counsel, and to insist that the statute of West Virginia prohibiting the receipt and possession of intoxicating liquors for personal use is a valid exercise of the police power of that state; that it does not contravene the 14th Amendment to the Federal Constitution; that such a statute lays the predicate for the operation of the prohibition contained in the Webb-Kenyon Act; and that said Federal Act is a valid exercise by Congress of the power to regulate commerce, in liquors, among states.

I.

THE WEBB-KENYON ACT IS VALID.

In the case of *Adams Express Co. v. Com. of Kentucky*, 238 U. S. 190, reference was made by this Court to the Webb-Kenyon Act, which was there construed.

The Court regarded the Act as a regulation of interstate commerce by Congress, pursuant to the responsibility resting upon it as recognized and stated in *Leisy v. Hardin*, 135 U. S. 100, and in the case of *In Re Rahrer*, 140 U. S. 546, to remove, so far as the regulation of interstate commerce is concerned, the restriction upon the states in dealing with imported articles of trade within their limits, which articles have not been mingled with the common mass of property therein.

In the *Kentucky case*, *supra*, reference was made to the Wilson Act of 1890 and to the case of *In Re Rahrer*, 140 U. S. 546, sustaining the same, in which it was held that Congress had not thereby attempted to delegate the power to regulate commerce, or to exercise any power reserved to the states, or to grant a power not possessed by the state, or to adopt state laws; but had taken its own course and made its own regulation, applying to subjects of interstate commerce one common rule whose uniformity is not affected by variations in state laws in dealing with such property; and that Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of state laws in respect to imported packages in their original condition, such impediment having been created by the absence of a specific utterance on the part of Congress; that Congress imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction.

It seems evident to us that the foregoing language applies with equal force to the prohibitions contained in the Webb-Kenyon Act, and conclusively establishes the validity of the same.

In *Rhodes v. Iowa*, 170 U. S. 412, and in *Vance v. Vandercook*, 170 U. S. 428, the Wilson Act was construed in such a way as that a state under its police power might regulate the traffic in intoxicating liquors after delivery to the consignee, although nothing in the Wilson Act prevented shipments of liquor in interstate commerce to a consignee for his own use, so long as he did not undertake to sell it. This result, however, was deduced from the "commerce clause" of the Federal Constitution in connection with the court's interpretation of the Wilson Act, and not from the 14th Amendment to the Federal Constitution, nor from a consideration of the police power of the state.

The cases just referred to rested rather upon the broad principle (which existed until there was Congressional action to the contrary) of the freedom of commerce between the states, and of the right of a citizen of one state to freely contract to receive merchandise from another state, and of the equal right of a citizen of a state to contract to send merchandise into other states, and they rested also upon the obvious want of power of one state to destroy contracts concerning interstate commerce, valid in the state where made, as explained by the present Chief Justice in the case of *American Express Co. v. Iowa*, 196 U. S. 133.

Hence, there was, as explained in the *Kentucky case*, *supra*, before the passage of the Webb-Kenyon Act, nothing to prevent shipment of intoxicating liquors in interstate commerce for the personal use simply of the consignee, the Wilson Act, as construed, not being intended by Congress to have that effect.

It is easily seen that the Wilson Act, as construed, would admit of the shipment and delivery to a citizen of large quantities of intoxicating liquors under the claim or pretence that they were for personal use, and that such stocks of liquors thus admitted might easily be made the means of conducting successfully an illicit traffic in liquors, and thereby defeat the valid efforts of the states to effectually prohibit such traffic. The presence also of unlimited quantities of liquors for personal use would entirely defeat the policy of the prohibition states in so far as efforts were made by them, directly or indirectly, to limit or prevent the consumption of intoxicants in order that drunkenness and intemperance among the people might be reduced, or, if possible, wholly prevented.

Congress considered it proper to exercise its power for the purpose of aiding the states in the efforts they might make under the police power to enforce their local policy in respect to intoxicating liquors, the traffic in them or the use of them by the people of the state, and hence, by the Webb-Kenyon Act, extended the Congressional prohibition so as to forbid in defined cases the introduction of liquors *at all* into a state from another state. The meaning of the Webb-Kenyon Act, as the Supreme Court said in the Kentucky case, is so plainly shown by the title and body thereof, that there can be no room for controversy as to its construction and no resort to outside sources to ascertain its true intent is necessary.

Whereas under the Wilson Act, unlimited quantities of liquor for personal use could freely move from one state into another and large quantities be obtained for illicit sale in a state under the false claim (often impossible to detect) that it was intended for personal use, now under the Webb-Kenyon Act, a shipment of liquor is entirely interdicted—forbidden even to be transported across the

state border—when it is intended to be dealt with in violation of the local state law, or, as more fully explained in the Act itself, when the liquor named in the Act, “is intended by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state;” that is to say, the state into which it is proposed to ship or transport the liquor in interstate commerce.

We cannot forecast what argument, if any, will be presented by appellant’s counsel against the constitutionality of the Webb-Kenyon Law as a regulation by Congress of interstate commerce. We have, however, examined the brief filed by appellant’s counsel and used upon the former hearing, which contains very little (less than two pages) upon the subject of the constitutionality of the Webb-Kenyon Law. The contention was there made that the Webb-Kenyon Law, “as construed and applied by the lower court,” would be unconstitutional. In support of this proposition there was a short extract from the case of *Rhodes v. Iowa*, 170 U. S. 412, asserting merely that the right of contract for the transportation of merchandise from one state to another, or across another, involved interstate commerce, and imported a relation which necessarily must be governed apart from the laws of the several states, since it embraced a contract which must come under the laws of more than one state. But this evidently is no authority against the validity either of the Wilson Act or of the Webb-Kenyon Act, since these Acts are regulations of commerce by Congress.

Counsel for appellant also in that connection quoted the following from the case of *In Re Rahrer*, 140 U. S. 546: “Nor can Congress transfer legislative power to a state, nor sanction a state law in violation of the Constitution; and if it can adopt a state law as its own, it

must be one that it would be competent for it to pass itself and not a law passed in the exercise of the police power." It is surprising that counsel would cite that paragraph as an authority against the Webb-Kenyon Act, since the opinion in the case of *In Re Rahrer, supra*, in an extract which we have already quoted, clearly showed that the Wilson Act (and the same thing may be said of the Webb-Kenyon Act) did not constitute a transfer by Congress of legislative power to a state, nor sanction a state law in violation of the Constitution; and that Congress had not, by the Wilson Act, adopted a state law as its own.

It is asserted further in appellant's brief in that connection, (and this completes substantially all that is said against the validity of the Webb-Kenyon Law), that contracts made by plaintiff in Maryland for the sale of liquors intended for the personal use of consignee in West Virginia, and their transportation and delivery at destination, are all subject matters which belong to interstate commerce and not to the reserved police power of West Virginia. This, we think, is entirely inapplicable to the present situation. Congress, by the Webb-Kenyon Act, has made a regulation of interstate commerce prohibiting shipments of liquor into one state from another in defined cases. In brief, the cases are: when the liquors desired to be shipped are intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of the law of such state.

There must, of course, in every case be a valid state law to be violated, and such state law in the matter of its validity, must be brought to the test of the state constitution and to the 14th Amendment of the Federal Constitution; but the "commerce clause" of the Federal Constitution is no longer a bar to state action, or to the en-

forcement of the state law, since Congress has intervened by a regulation of its own and made it possible for the power of the state, under a valid law, to do its full and perfect work in respect to liquors of the character named.

The assault upon the Webb-Kenyon Bill by counsel for the appellant in the former brief is so weak and so meagre, that we cannot think that counsel had any serious expectation of having the Webb-Kenyon Law declared to be invalid. Not only that, but a careful reading of the opinion of the court in *Adams Express Co. v. Kentucky*, *supra*, a consideration of the treatment of the case, and the general trend of the opinion lead us to the conclusion that the court has already made up its mind that the Webb-Kenyon Act is valid. We can scarcely believe that the opinion would have been prepared as it was, and reference would have been made in the opinion to the Webb-Kenyon Act in the terms employed, if the court had doubted its validity. The Supreme Court of North Carolina, in *Glenn v. Southern Express Co.*, (decided December 1st, 1915), has said that the opinion of the Supreme Court in the case of *Adams Express Co. v. Kentucky*, *supra*, gives color to the belief that the court regards the question as settled. It seems to us that it is necessarily sustained by previous utterances of the court in respect to the Wilson Act, and such is the conclusion of all the courts, State and Federal, that have thus far had occasion to pass upon said Act. We cite cases which contain all that can be said upon this subject and which we think conclusively establish the validity of the Webb-Kenyon Act:

Southern Express Co. v. State, 188 Ala. 454; 66 South. Rp. 115.

Southern Express Co. v. Whittle, (Ala.) 69 South. Rp. 652.

State v. S. A. L. R. R., 169 N. C. 303; 84 S. E. 283.

Glenn v. Southern Express Co., (N. C.) 87 S. E. Rp. 136.

State v. Doe, (Kan.), 139 Pac. 1169.

State v. Express Co., (Iowa), 145 N. W. 451.

Southern Express Co. v. Beer, (Miss.), 65 South. 575.

Atkinson v. Southern Express Co., 94 S. C. 444; 78 S. E. 516.

Taylor v. Commonwealth, (Virg.), 95 S. E. 499.

Adams Express Co. v. Com. of Ky., 160 Ky. 66; 169 S. W. 603.

State v. Grier, (Del.), 88 Atl. 579.

Van Winkle v. State, (Del.), 91 Atl. 385.

U. S. v. Oregon-W. R. & N. Co., 210 Fed. 378.

West Virginia v. Adams Ex. Co., (C. C. A.), 219 Fed. Rp. 579.

There is nothing in the terms of the Webb-Kenyon Act to indicate that the state laws referred to therein must constitute a total prohibition of the receipt, possession, sale, or use in any manner, of intoxicating liquors.

A regulatory or restrictive measure short of total prohibition is a police measure and has been held by this court to be within the terms of the Wilson Act of 1890.

Vance v. Vandercook, 170 U. S. 438 (reversing on this point, *Vandercook v. Vance*, 80 Fed. 786).

Reymann Brewing Co. v. Brister, 179 U. S. 445.

Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 25.

Phillips v. City of Mobile, 208 U. S. 472.

Tinker v. State, 90 Ala. 638, 641.

Stevens v. State, 61 Ohio State 605; 56 N. E. 479.

We submit that the Webb-Kenyon Act, viewed as a regulation by Congress of interstate commerce, presents no

difficulty as to shipments of liquor for personal use; and that the language is clearly broad enough to include such shipments, if a state law against receipt or possession of liquors for personal use offends no provision of the state constitution nor the 14th Amendment to the Federal Constitution. The Webb-Kenyon Act would accomplish very little if construed in such a way that liquors for personal use, or liquors claimed to be for such use, may continue to freely move in interstate commerce.

It must be noted that in *Adams Express Co. v. Commonwealth of Kentucky*, 238 U. S. 190, this court held that the shipment in question was not illegal in view of the laws of Kentucky, "*as construed by the highest court of that state,*" without in any way committing itself to the correctness of such construction of the law and Constitution of Kentucky. The Kentucky statute was not by the Supreme Court subjected to the test of the 14th Amendment to the Federal Constitution; nor did the court declare that the result in the case was one of general application and that no other state could constitutionally forbid the receipt and possession by a citizen of intoxicating liquors for personal use.

The Webb-Kenyon Act is in the form of a prohibition against shipments of liquor in interstate commerce in defined cases; it is well settled that Congress may regulate commerce by adopting prohibitions excluding certain articles from the right to be transported from one state into another.

Champion v. Ames, 188 U. S. 321. (Lottery tickets.)

U. S. v. Freight Association, 166 U. S. 290.

U. S. v. Freight Association, 171 U. S. 505.

Addystone P. & S. Co. v. U. S., 175 U. S. 211.

(Prohibitory clauses of Sherman Anti-Trust Act.)

Hoke v. U. S., 227 U. S. 308. (White Slave Traffic.)

Hipolite Egg Co. v. U. S., 220 U. S. 45. (Adulterated articles of food.)

Reid v. Colorado, 189 U. S. 137. (Live stock having infectious and contagious diseases.)

State v. U. S. Express Co., (Ia.), 145 N. W. 451.

U. S. v. Forty-three Gallons of Whiskey, 93 U. S. 188.

Perrin v. U. S., 232 U. S. 478.

Buttfield v. Stranahan, 192 U. S. 470.

U. S. v. Bopper, 98 Fed. Rep. 423.

State v. Cardwell, 81 S. E. 628, 632. (Opinion of Chief Justice Clark.)

West Virginia v. Adams Express Co., (C. C. A.), 219 Fed. Rep. 794.

II.

NEITHER THE 14TH AMENDMENT TO THE FEDERAL CONSTITUTION NOR THE "DUE PROCESS" CLAUSE OF STATE CONSTITUTIONS GUARANTEE TO A CITIZEN THE RIGHT TO RECEIVE AND POSSESS INTOXICATING LIQUORS FOR PERSONAL USE IN UNLIMITED QUANTITIES, OR IN ANY QUANTITY, AS AGAINST THE EXERCISE OF THE POLICE POWER BY THE STATE. THERE IS NO SUCH GUARANTY TO A CITIZEN OF WEST VIRGINIA IN THE CONSTITUTION OF THAT STATE AS AMENDED JULY 1ST, 1914.

We propose to develop the propositions just stated, in paragraphs to follow, under appropriate heads.

1. ALCOHOL AS A BEVERAGE IS INHERENTLY HARMFUL AND DANGEROUS.

At this point we quote an extract from an article on "LEGAL ASPECTS OF PROHIBITION," by Herbert C. Shattuck, A. B., LL. B., of the New York Bar, in "Case and Comment" for December, 1913, page 641, as follows:

"The basic fact underlying all agitation for the restriction or prohibition of the traffic in intoxicating liquors is *that alcohol, the essential ingredient of those liquors, is inherently harmful and dangerous when used as a beverage.* The scientific accuracy of this statement now seems to be generally recognized. The public schools of the nation teach it. Alcohol is a waste product in the activity of the yeast plant, (C. F. Hodge, Clark University, 'Physiological Aspects of the Liquor problem'), an excrement of the yeast fungus, a parasite which is midway between a plant and an animal.—(T. Alexander McNicoll, M. D., New York, Vice President American Medical Soc. for the study of Alcohol and other Narcotics.) *Alcohol is an active poison to the nervous system.*—1 Wharton & S. Med Jr., 5th Ed. Sec. 921.) *It ranks with other poisons like strychnine, arsenic, and opium.*—(Sir Andrew Clark, Physician to Queen Victoria.) *If it is a food, it is a poisoned food.*—(Dr. F. Peterson, New York.)

"This dangerous character of alcoholic liquors is recognized also by the courts. They have declared that intoxicating liquor in its nature is dangerous to the morals, good order, health and safety of the people, and is not to be placed on the same footing with the ordinary commodities of life.—(*State ex*

rel George v. Aiken, 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345; *Schwartz v. People*, 46 Colo. 239, 104 Pac. 92.

"If then alcohol is a dangerous drug, it is but natural that the traffic in alcoholic liquors should not be considered in the same light as business of other kinds, but should be separated from them and be treated on its own merits. The courts recognize this fact. They say that intoxicating liquor is an article conceded to be fraught with such contagious perils to society that it occupies a different status before the courts and the legislatures from that of other kinds of property, and traffic in it is thereby placed upon a different plane from that of other kinds of business. There is therefore no question in cases dealing with intoxicating liquor, of the power of the legislature to say generally what beverage men shall drink or what they shall eat or wear. The discussion in these cases must deal solely with a distinct article of trade. —(*State v. Durien*, 70 Kan. 1, and 135, 78 Pac. 152 and 80 Pac. 987.)"

2. THE POLICE POWER OF THE STATE, AND ITS EXTENT.

(a) The police power belongs to the states, has not been surrendered by them to the general government nor restrained by the Constitution of the United States, and is essentially exclusive.

Barbier v. Connolly, 113 U. S. 273.

In Re Rahrer, 140 U. S. 545.

"It cannot be denied that the power of the state to protect the lives, health and property of its citizens and to preserve good order and the public mor-

als, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive."

United States v. E. C. Knight Co., 156 U. S. 1.

"On the other hand, the power of Congress to regulate commerce among the several states is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraints. Therefore it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by several states, and if a law passed by a state in the exercise of its acknowledged powers comes in conflict with that will, the Congress and the state cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof; and that which is not supreme must yield to that which is supreme."

United States v. E. C. Knight Co., 156 U. S. 1.

Interstate commerce even in intoxicating liquors is national in character, and so long as Congress did not pass any laws to regulate it specifically in such a way as to allow the laws of the state to operate upon it, Congress indicated its will that commerce therein should be free and untrammelled. Hence, in the absence of Congressional action, laws prohibiting receipt and sale in original packages were inoperative.

Bowman v. R. R. Co., 125 U. S. 465.

Leisy v. Hardin, 135 U. S. 100.

The Wilson Act of 1890 changed this situation in part.

Rhodes v. Iowa, 170 U. S. 412.

Vance v. Vandercook, 170 U. S. 438.

The Webb-Kenyon Act extended the prohibition against the introduction of liquors into a state by means of interstate commerce.

Adams Express Co. v. Com. of Ky., 238 U. S. 190.

(b.) "It may be said in a general way that the police power extends to all the great public needs."

Canfield v. U. S., 167 U. S. 518.

"It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

Holmes, J., in *Nobles State Bank v. Haskell*, 219 U. S. 104.

"When a state, exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government."

Hughes, Justice, in *Purity Extract & T. Co. v. Lynch*, 226 U. S. 192.

To the same effect are:

Lawton v. Steele, 152 U. S. 133.

New York ex rel Silz v. Hesterberg, 211 U. S. 31.

Patson v. Penn., 232 U. S. 138.

Booth v. Illinois, 184 U. S. 426.

Otis v. Parker, 187 U. S. 607.

Murphy v. California, 225 U. S. 623.

The foregoing principle has been applied by the Supreme Court to prohibitions against *possession* of certain things as a proper means to accomplish an ulterior valid purpose.

New York ex rel Silz v. Hesterberg, 211 U. S. 31.

Lawton v. Steele, 152 U. S. 133.

Patson v. Penn., 232 U. S. 138.

(c.) Intoxicating liquors are a subject of commercial intercourse between the states, yet state prohibitory laws within a state do not necessarily infringe any right, privilege or immunity secured by the Constitution of the United States or its amendment. The right of the states under the police power to regulate, restrain, or forbid the manufacture or sale of intoxicating liquors has been fully established by the Supreme Court.

In Re Rahrer, 140 U. S. 545.

Foster v. Kansas, 112 U. S. 201.

Mugler v. Kansas, 123 U. S. 623.

Boston Beer Co. v. Mass., 97 U. S. 25.

Kidd v. Pearson, 128 U. S. 1.

Crowley v. Christensen, 137 U. S. 91.

A state may prohibit the sale of non-intoxicating malt liquors if the legislature deems it a necessary means to suppress the trade in intoxicants.

Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, and the cases cited.

A state may constitutionally prohibit or regulate the receipt and possession of intoxicating liquors by a citizen even when for his own use; and since the Webb-Kenyon Law this principle will apply to such liquors moving into the state from another state.

Southern Express Co. v. Whittle, (Ala.) 69 So. Rep. 652.

Ex parte Crane, (Idaho), 151 Pac. 1006.

Glenn v. Southern Express Co., (N. C.), 87 S. E. 136.

U. S. v. Oregon-W. R. & N. Co., 210 Fed. 378.

Preston v. Drew, 33 Me. 558, 54 Am. Dec. 639.

Heyward v. Henderson, 109 Ga. 373; 47 L. R. A. 36, per Cobb, J.

The state may prohibit the solicitation of orders for intoxicating liquors and also the advertising of such liquors, although the liquors if purchased are in another state and would have to be brought into the state, making the prohibition, in interstate commerce.

Delmater v. South Dakota, 205 U. S. 93.

State v. Delaye (Ala.), 68 So. Rep. 993.

State v. Davis, (West Virginia), decided November 30th, 1915.

A prohibition state may make it unlawful for any person, firm, association, or corporation, whether a common carrier or not, to convey or transport liquors over or along any public street or highway for another, and may also prohibit the transportation of liquors from one part of the state to another.

Williams v. State, 179 Ala. 51.

Western of Alabama Railway v. Brewing Co., 177 Ala. 149.

A prohibition state may also prohibit the keeping or storage of liquors in social or farternal clubs, even when it is for the personal use of the members thereof.

Wallace v. State, 8 (Ala.) App. Ct. Rep. 386, 62 So. Rep. 365.

State v. Phillips, (Miss.), 67 So. Rep. 651.

State v. Topeka Club, 82 Kans., 756; 109 Pac. 183.

In *Bowman's Case*, 125 U. S. 465, which was a case involving intoxicating liquors, Field, Justice, in a concurring opinion said that the state may regulate or prohibit *the sale or use* of an article for the protection of the health, morals, and safety of the people.

In the same opinion, Mr. Justice Field further said:

"But those powers which authorize legislation touching the health, morals, good order, and peace of their people were not delegated, and are so essential to the existence and prosperity of the states, that it is not to be presumed that they will be encroached upon so as to impair their reasonable exercise

"How can these reserved powers be reconciled with the conceded power of Congress to regulate interstate commerce? As said above, the state cannot exclude an article from commerce, and consequently from importation, simply by declaring that its policy requires such exclusion; *and yet its regulations respecting the possession, use and sale of any article of commerce* may be as minute and strict as required by the nature of the article and the liability of injury from it, for the safety, health, and morals of its people."

Further on in the opinion, (speaking of *Mugler v. Kansas*), Mr. Justice Field said:

"Assuming, therefore, as correct doctrine that the right of importation carries the right to sell the article imported, the decision in the *Kansas case* may perhaps be reconciled with the one in this case by distinguishing the power of the state over property created within it, and its power over property imported—its power in one case extending, for the protection of the health, morals, and safety of its people, to the absolute prohibition of the sale or use of the article, and in the other, extending only to such regulations as may be necessary for the safety of the community until it has been incorporated into and become a part of the general property of the state."

This, of course, was said before the enactment of the Wilson Act or of the Webb-Kenyon Act, it being the purpose of the latter to allow the police power of the state to have full operation over intoxicating liquors without being dominated by the "commerce clause" of the Federal Constitution; or, in other words, to permit the states to as fully regulate or prohibit the receipt, possession, use, and sale, of intoxicating liquors as if the "commerce clause" were not included in the Federal Constitution.

If a state has the right to prohibit the manufacture of intoxicants for one's own use, and the right to prohibit the sale thereof to a citizen for his own use, it must also, upon the same grounds and for the same reason, have the right to prohibit the introduction into the state, and hence, the use and possession of such intoxicants, if the protection of the Federal Constitution be by Congress withdrawn from such shipments.

In *Brown v. Maryland*, 12 Wheaton 420, Chief Justice Marshall said:

"There is no difference in effect between the power to prohibit the sale of an article and a power to pro-

hibit its introduction into the country, the one would be a necessary consequence of the other."

Congress would have the power, if it desired to exert it, to exclude altogether ardent spirits from commerce among the states. This is shown by a paragraph from the opinion of Mr. Justice Harlan, speaking for the court, in *Champion v. Ames*, 188 U. S. 321, 362, as follows:

"Thus, under its power to regulate interstate commerce, as involved in the transportation, in original packages, of ardent spirits from one state to another, Congress by the necessary effect of the Act of 1890 made it impossible to transport such packages to places within a prohibitory state and there dispose of their contents by sale; although it had been previously held that ardent spirits were recognized articles of commerce and, until Congress otherwise provided, should be imported into a state and sold in the original packages, despite the will of the state. *If at the time of the passage of the Act of 1890, all the states had enacted liquor laws prohibiting the sale of intoxicating liquors within their respective limits, then the act would have had the necessary effect to exclude ardent spirits altogether from commerce among the states; for no one would ship, for purposes of sale, packages containing such spirits to points within any state that forbade their sale at any time or place, even in unbroken packages, and, in addition, provided for the seizure and forfeiture of such packages. So that we have in the 'Rahrer Case' a recognition of the principle that the power of Congress to regulate interstate commerce may some times be exerted with the effect of excluding particular articles from such commerce.*"

(d). In *Holden v. Hardy*, 169 U. S. 363, involving the validity of a statute of Utah, limiting the period of em-

ployment of workmen in underground mines, or in the smelting, reduction or refining of oils or metals, to eight hours a day, the statute was held to be a valid exercise of the police power of the state.

Mr. Justice Brown, speaking for the court, said:

"The right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police power. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to the enormous increase in occupations which are dangerous or so far detrimental to the health of employees as to demand special precaution for their well-being and protection, or the safety of adjacent property.

* * * * *

"While this power is necessarily inherent in every form of government, it was, prior to the adoption of the Constitution, but sparingly used in this country. As we were then almost purely an agricultural people, the occasion for any special protection of a particular class did not exist. *Certain profitable employments, such as lotteries and the sale of intoxicating liquors, which were then considered to be legitimate, have since fallen under the ban of public opinion, and are now either altogether prohibited or made subject to stringent police regulations.* The power to do this has been repeatedly affirmed by this court."

In the same case, it was shown that an individual under the police power may be protected by the state from himself, and that the state has an interest in the well-being of the individual:

"But the fact that both parties are of full age and competent to contract does not necessarily deprive

the state of the power to interfere where the parties do not stand upon an equality, *or where the public health demands that one party to the contract shall be protected against himself. The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all of the parts, and when the individual health, safety or welfare is sacrificed, or neglected, the state must suffer.*"

3. THE REAL PURPOSE OF PROHIBITION LEGISLATION IS TO PREVENT PERSONAL USE OF LIQUOR.

It seems strange at this late day to hear a claim made that the state and national governments guarantee to a citizen the right to possess and receive liquor for personal use and to drink the same in unlimited quantities. If such had been the case, it is difficult to see how any sort of prohibitory law could have ever been sustained, since all of them have a direct tendency to reduce or prevent the use of intoxicating beverages, and it is the purpose of all of them to promote temperance by the prevention of the consumption of intoxicants. This purpose has found repeated expression in adjudged cases.

In the early case of *Lincoln v. Smith*, 27 Vermont 328, we find the following statement:

"Though the act of our legislature is entitled an act 'to prevent the traffic in intoxicating liquors for the purpose of drinking,' *yet the primary object and end of the law is the prevention of intemperance, pauperism and crime; and the prohibition of the traffic is but the medium through which the object and end of the law is to be at-*

tained. If it be once granted that the use of intoxicating liquors as a drink is worse than useless, and intemperance a legitimate consequence of such use, and that intemperance is an evil, injurious to health and sound morals and productive of pauperism and crime; it seems to us, that a law designed to prevent such consequences must clearly fall within the class of laws denominated police regulations. The legislature in passing the law in question, doubtless supposed *that the traffic and drinking of intoxicating liquors went hand in hand, and that they were even more than twin sisters, that they were not only born together, but that they would also die together, and that by cutting off the one, the other would also fall with it.* Whether the drinking of intoxicating liquor tends to produce intemperance, and whether intemperance is a gangrene, tending to corrupt the moral health of the body politic, and to produce misery and lamentation; and whether the law in question is well calculated to cut off, or mitigate the evils supposed to flow *directly from intemperance, and indirectly from the traffic in intoxicating liquors,* were questions to be settled by the law-making power; and their decision in this respect is final, and not to be reviewed by us. It is clear the legislature assumed all this, in the passage of the law in question; and, in our passing upon its validity, we are not to assume the contrary."

In *Marks v. State*, 159 Ala. 71, speaking of local and general prohibitory statutes, Mayfield, Justice, said:

"The main object and purpose of all is the same. Some may be restricted, and some more extensive and exclusive than others; but the main object and

purpose of all, as said by Justice Somerville in *Carl's* case, 87 Ala. 17, 6 South. 118, 4 L. R. A. 308 is to 'promote temperance and prevent drunkenness. The mode adopted to accomplish this end is the prevention of the sale, the giving away, or other disposition of intoxicating liquors. *The evil to be remedied is the use of intoxicating liquors as a beverage*, rather than as an ingredient of medicines and articles of toilet, or for culinary purposes, and the object of the law in this particular must not be lost sight of in its interpretation.' "

This utterance is re-affirmed by the Supreme Court of Alabama in *Southern Express Co. v. Whittle*, (Ala.), 69 South. Rep. 652.

In *State v. Phillips*, (Miss.), 67 South. Rep. 651, the court said:

"If the object of prohibition of the sale of intoxicating liquors is not to prevent, as far as may be, the drinking of such liquors, then it is difficult to justify the laws prohibiting the sale. Of course the typical public saloon is demoralizing, but there would be no practical difficulties in the way of so regulating the saloon as to minimize all of the evils which flow from the saloon, except the evils which flow from the drinking of intoxicating beverages. If it is not a menace to the health, morals, welfare, and peace of the public for men and women to drink alcoholic liquors, it would seem that the public could have no interest in prohibiting the sale. The ultimate purpose and end of prohibition is to prevent the use of liquor as a beverage. This ultimate end is approached step by step, and when the preponderant and prevailing morality of the nation believes that the public welfare demands the

final step, the way will be found to accomplish the end."

In *West Virginia v. Adams Ex. Co.*, 219 Fed. 794, the same thought is thus expressed:

"In trying to comprehend the legislative purpose in prohibition statutes, it is important to remember that the ultimate end sought in prohibition legislation is not the prevention or restriction of the mere sale of intoxicants, *but the prevention of their consumption as a beverage*. The sale being the most usual and obvious means by which drinking is accomplished, the legislation is more often directed against the sale. But it is upon the recognized evil of individual consumption as a beverage that the right of a state under its police power rests to enact prohibitive legislation; and in the exercise of that right it cannot be denied that the state may legislate not only against acts which would constitute a sale at common law but against other acts within its borders, such as deliveries by common carriers, which tend to defeat or weaken its public policy of preventing the consumption of liquor as a beverage."

(Maine.) "It is common knowledge that it is the use of intoxicating liquors as a beverage that is deemed harmful, and is the mischief sought to be prevented by the legislation. The prohibition of the sale and keeping for sale of intoxicating liquors is only a means. The end sought for is the prevention, or at least the diminution of the drinking of intoxicating liquors by the people of the state. The legislation upon the subject, including the statute in question in question, should be con-

strued to further that end, so far as the language, without bending either way, fairly allows."

Maine v. Bass. Pub. Co., (Me.), 71 Atl. 894, 20 L. R. A. (N. S.) 495, 496.

(California.) "It cannot for a moment be doubted that the great ultimate object of all legislation on the subject of intoxicating liquors is as obviously true of the statute in question, to reduce to the lowest limit the individual use and consumption of such liquors as beverages, and thus diminish intemperance. * * * Indeed, it is, as before intimated, within the constitutional rights of the legislature in the exercise of the police power of the state, to establish any regulation *which may tend to remove every temptation to use intoxicants as beverages under any circumstances.*"

Golden & Co. v. Justice's Court, (Cal.), 140 Pac. 49.

In *Crowley v. Christensen*, 137 U. S. 87, it was urged, that if injury followed the use of liquors as a beverage, it was voluntarily inflicted and confined to the party offending; and hence the sale should be without restriction, upon the theory that what a man shall drink, equally with what he shall eat, is not properly a matter for legislation; but the court did not accept the suggestion as sound. Mr. Justice Field, speaking for the court, saying:

"There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true, first falls upon him in his health, which the habit under-

mines; in his morals, which it weakens; and in the self-abasement which it creates. But, as it leads to neglect of business and waste of property and general demoralization, *it affects those who are immediately connected with and dependent upon him.*"

The case of *Mugler v. Kansas*, 123 U. S. 623, is clearly fatal to the claim that under the police power, the use and consumption of liquors by a citizen may not find any interference. It was contended in that case, that among the rights guaranteed to a citizen by the constitutional provision protecting persons against being deprived of life, liberty, or property without due process of law, is the right of manufacturing for one's own use either food or drink; that while according to the doctrines of the Commune, the state may control the tastes, appetites, habits, dress, food and drink of the people, our system of government, based upon the individuality and intelligence of the citizen, does not claim to control him, except as to his conduct to others, leaving him the sole judge as to all that only affects himself.

But this contention found no favor with the court, which declared that if a state deems the absolute prohibition of the manufacture and sale, within her limits of intoxicating liquors for other than medicinal, scientific, and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot override the will of the people as thus expressed. Hence, it was declared that if in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use

of such liquors, it is not for the courts upon their view as to what is best and safest for the community, to disregard the legislative determination of that question.

Now if the end and object of this legislation is to prevent the consumption of intoxicating liquors as a beverage or to restrict the consumption thereof, and if the evil to be remedied is the use of intoxicating liquors as a beverage, and this end and purpose be a proper one, why may not the legislature, if in its judgment it is proper and necessary, so to proceed, directly declare it shall be unlawful for a citizen to acquire property in, or to own or possess intoxicating liquors? Must a state act by indirection? May not a state accomplish directly what it is right to accomplish indirectly? Why make an exception in such a case to the general rule that what may be accomplished indirectly, may be accomplished directly.

It results from the authorities above cited that the Federal Constitution contains no guaranty to a citizen of a state or of the United States, that he must somewhere be able to obtain intoxicating liquors for personal use, so far as the 14th Amendment is concerned; nor has he any such right under the "commerce clause" since the Webb-Kenyon Act, if a valid state law would be infringed by the receipt or possession of liquor for personal use.

4. EXTENT OF POLICE POWER RESPECTING PERSONAL USE OF LIQUORS FURTHER CONSIDERED.

If a state has the right to prohibit the manufacture of intoxicating liquor by a citizen for his own use, every other state in the Union has, or may have, the same right. Hence, if all the states would pass laws prohib-

iting the manufacture by a citizen of intoxicating liquors for his own use, and prohibit the sale of such liquors within its borders to a citizen for his own use, what would become of the supposed right of a citizen to secure liquor for his own use? Or, what would become of such right, if Congress should exercise its well-settled power to exclude all intoxicating liquors from interstate shipment? Or, what would become of his right, if the Federal government should prohibit the importation of intoxicating liquors into this country, after all the states had prohibited its manufacture?

If a citizen of a state has the right to obtain intoxicating liquors for his own use in any quantity, or in unlimited quantities, it would seem to follow he should at least have the right to manufacture such liquor for his own use from the products of his own labor, and yet it is settled he has not such right.

Is the supposed constitutional right of a citizen to have liquor to be dependent upon the state of legislation in another state, or the state of legislation by Congress?

Are the laws of a state prohibiting the manufacture of intoxicating liquors by a citizen for his own use, and the sale of such liquors in a state for the use of the purchaser, constitutional and valid only so long as a way is left open for the securing by the citizen of intoxicating liquors elsewhere, either in the United States or in some foreign country?

If a person has a constitutional right to purchase intoxicating liquors for his personal use, the seller would seem to have the constitutional right to sell it for such purchaser's personal use, and yet it is settled that no one has a constitutional right to sell intoxicating liq-

uors. Such a right is not one of a citizen of a state, or of a citizen of the United States.

The person who sells liquor to a purchaser may sell it for the purchaser's own use, and yet the state has the power to deprive the latter of the right to purchase, by prohibiting any one to sell liquor to him. It would seem, therefore, clear that if a citizen may not manufacture liquor for his personal use, then he has not the constitutional right to purchase or receive such liquors for his own use, especially when such purchase or receiving is a violation of the law by the person selling or delivering such liquor.

Furthermore, this court, in *Mugler v. Kansas*, sustained a provision broad enough to prohibit the manufacture of liquor for personal use, since a contrary ruling might have defeated the entire scheme of prohibition as embodied in the laws of Kansas. The meaning was that if such privilege were recognized, the consumption of liquors would be but little restricted, since large stocks would be manufactured under the pretence of the need of them for personal use, and then could be made an instrument of defeating the law against sale.

To accomplish the admittedly valid main purpose of prohibiting the traffic in liquors, it is necessary for a state, under its police power, to have the right to control interstate shipments even for personal use. This is a step which has a fair relation to the end to be accomplished. What is the difference in principle between the denial of the right to manufacture, and a denial of the right to import?

This line of reasoning was adopted by District Judge Bean (former Chief Justice of Oregon) in *U. S. v. Oregon-Wash. Rail & Nav. Co.*, 210 Fed. Rep.

The same principle was laid down by the Supreme Court of Alabama in *Southern Express Co. v. Whittle*, 69 South. Rep. 652, and approved and re-affirmed by the Supreme Court of North Carolina in *Glenn v. Southern Ex. Co.*, 87 S. E. 136.

The principle for which we are contending under the police power was announced at an early date, in *Preston v. Drew*, 33 Me. 558, 54 Am. 639, where Shepley, C. J., said:

"The state, by its legislative enactments, operating prospectively, may determine that articles injurious to the public health or morals shall not constitute property within its jurisdiction.

"It may come to the conclusion that spirituous liquors, when used as a beverage, are productive of a great variety of ills and evils, to the people, both in their individual and in their associate relations; that the least use of them for such a purpose is injurious and suited to produce, by a greater use, serious injury to the comfort, morals and health; that the common use of them for such a purpose operates to diminish the productiveness of labor; to injure the health; to impose upon the people additional and unnecessary burdens; to produce waste of time and of property; to introduce disorder and disobedience to law; to disturb the peace, and to multiply crimes of every grade. Such conclusions would be justified by the experience and history of man. If a legislature should declare that no person should acquire any property in them for such a purpose, there would be no occasion for complaint that it had violated any provision of the Constitution."

In *Heyward v. Henderson*, 109 Ga. 373, 47 L. R. A. 36, 77 Am. St. Rep. 384, the court dealt with a municipal

ordinance making penal the buying of alcoholic liquor. It was held that without express legislative authority, the city under the general welfare clause of its charter could not enact such an ordinance, since the Legislature of the state had never adopted the policy of forbidding the buying of such liquor. And yet, upon the question now under consideration, Judge Cobb, speaking for the court, said:

"It may be that the state would have a right to prohibit the purchase of whiskey; that the state has a right to prohibit absolutely the sale of whiskey is no longer an open question either in this court or in the Supreme Court of the United States." And furthermore, "It may be contended with great force, that if the state, notwithstanding his recognized property right in alcoholic liquors, can under its police power entirely destroy the right of the owner of said liquors to sell or dispose of the same within the limits of the state, which would in some instances be a practical confiscation of the property, it has the power to declare that no person shall by purchase come into possession of such property within the limits of the state. Laws prohibiting the sale of whiskey are upheld as constitutional, upon the ground that its sale is against the best interest of the public at large, and is a business which, if not inherently evil, is of such a nature that its presence is a constant menace to the peace and good order of society, as well as the welfare of individuals. *If this be true*, it would seem to follow that the state might enact any law which would effectually prohibit the traffic. A law prohibiting the sale would, if effectually enforced, prohibit the buying; and so also, the prohibition of the purchase would likewise prohibit the sale. The prohibition of the sale, therefore, puts a ban upon the entire traffic. Of course, a law mak-

ing penal the sale would not, without more, make penal the buying; but the practical effect of such a law, if enforced, would be to prohibit the buying. It would seem to follow, therefore, that the state might go further than it has already gone, and make penal the buying."

In *So. Ex. Co. v. High Point*, (N. C.), 83 S. E. 254, 255, Chief Justice Clark, in a concurring opinion, said:

"There is nothing in the state or Federal Constitution which prohibits the people of North Carolina, speaking through the legislature, to prohibit the manufacture of intoxicating liquors even solely for one's own use. This is held in *Mugler v. Kansas*, 123 U. S. 623, it following that the legislature can equally prohibit the importation of such liquors by any person for his own use; and *a fortiori*, it can forbid a common carrier to bring in or import such liquors, irrespective of whether it is for the consignee's *own use or not*."

5. STATE DECISIONS, SUSTAINING RECENT STATE LAWS, WHICH ARE CONTRARY TO APPELLANT'S CONTENTION AS TO RIGHT OF A CITIZEN TO RECEIVE AND POSSESS LIQUORS FOR PERSONAL USE.

ALABAMA.

The Legislature of Alabama at its recent session passed a law, effective February 8th, 1915, containing, among others, the following provision:

"Section 12. That it shall be unlawful for any person, firm, or corporation, (1) to receive or accept

delivery of, or to possess or to have in possession at one time, whether in one or more places, and whether in original packages or otherwise, more than one-half gallon of spirituous liquors, or more than two gallons of vinous liquors, or more than five gallons of malted liquors, when in kegs, or more than sixty pints when in bottles, or more than one gallon of any other intoxicating or fermented liquors beyond those thus enumerated; or (2) to receive, accept delivery of, possess or have in possession, more than one gallon of spirituous liquors, or four gallons of vinous liquors, or more than ten gallons of malted liquors, including beer and ale when in kegs, or one hundred and twenty pints in bottles, or more than two gallons of any other fermented or intoxicating liquors beyond those enumerated, within any four consecutive weeks, whether in one or more places."

The statute applies to liquors no matter when, how, or whence obtained.

This statute was assailed by one Whittle, a liquor dealer of Pensacola, Florida, who sought to compel the Southern Express Company to receive for delivery in Alabama, six quarts of whiskey for personal use.

The Supreme Court held that the Express Company properly refused to accept the same for shipment, because it was intended to be received by the consignee, farmer, in violation of the limitation of one-half gallon of spirituous liquors at one time, prescribed by the terms of said section 12.

The whole court held that section 12 was valid, and that it offended no provision of either the state or Federal Constitution. The opinion contains an elaborate consideration of the questions involved, and the case is re-

ported as *Southern Express Co. v. Whittle*, (Ala.), 69 South. Rep. 652. We invite the court to a careful reading and consideration of the opinion, and extract from it the following:

"If the right at common law to manufacture an intoxicating liquor for one's own personal use, out of one's own materials, by the application of one's own personal effort, may be forbidden by appropriate legislation under the police power, as was expressly ruled in *Mugler v. Kansas*, supra, it cannot be logically or soundly asserted that the receipt or possession of more than a specified quantity at one time may not be forbidden by statute; especially when the sale or other disposition of intoxicants is forbidden in the state's effort to promote temperance and to suppress the evils of intemperance by visiting its power upon one of the means usually productive of intemperance, viz., the traffic therein; or, as has been before quoted from our *Marks* and *Carl* cases (ante), to remedy the evil present in 'the use of intoxicating liquors as a beverage.' The power confirmed in *Mugler v. Kansas* must necessarily comprehend the lesser manifestation of a like power, by regulating the quantity to be received or possessed at one time in 'dry territory' in the state. Furthermore, it would appear to be but the assertion of a self-evident truth to say: that since one may be validly forbidden to *sell* his intoxicating liquors to another, that other may be validly forbidden to buy the article from him; and, if one may be validly forbidden to sell, and necessarily validly forbidden to *deliver* the article, to another, that other may be validly forbidden to accept delivery. As to the seller, the prohibitions stated would operate upon him and upon his property, but not in the sense or with the

effect of infringing any constitutional right or immunity. (*Dorman's case*, supra): whereas, in the latter case, the buyer, the prohibition would operate in anticipation, qualifying his right—in the interest of the public welfare as determined by the authority, the law-makers, with which the decision in such circumstances rests—to acquire a property interest in the article above a defined quantity at one time.”

The Supreme Court of Alabama also considered the statute as a means to the enforcement of the prohibition law against the sale of liquors. After citing with approval the cases of *Patson v. Penn.*, 232 U. S. 138, *Silz v. Hesterberg*, 211 U. S. 31, and *Lawton v. Steele*, 152 U. S. 133, in which *possession of certain personal property* was held to be validly prohibited as a means to the accomplishment of an ulterior valid purpose,

McClellan, Justice, speaking for the court, proceeded further to say:

“In *Delamater v. South Dakota*, 205 U. S. 93—recently followed and applied by this court in *State v. Delaye*, in Manuscript (68 South. Rep. 993)—the Supreme Court vindicated an enactment forbidding the solicitation of orders for intoxicants by a non-resident of the state. This court had already, in *Moog v. State*, 145 Ala. 75, sustained such a law as applied to residents of the State. The remedy for an admitted evil, viz., the use of intoxicants as a beverage, was found to fairly include the act of soliciting orders. The insistence strikingly illustrates the authorized progress manifested by and for the exercise of the police power of the state, and the recognition by the courts of the fact that all commands or prohibitions ancillary and reasonably related to the state's pur-

pose to promote temperance and to suppress the evils of intemperance, whether through the prohibition of the traffic as the chief means to that end or not, cannot be thwarted or annulled on any idea that constitutional rights are thereby violated or invaded."

This case is also interesting in that the court declared that the case of *Eidge v. City of Bessemer*, 164 Ala. 559, (one of the cases relied upon by appellant's counsel in his brief on the former hearing), was not an authority against the validity of the Alabama statute, and the court gave the reasons why said case was not a governing authority, one of the reasons being that the case involved the ordinance of a municipality and not a statute of the state, the ordinance going beyond and in advance of any state statute then of force.

The Supreme Court of Alabama also disapproved of the majority view in *State v. Williams*, 146 N. C. 618, the decision being in the opinion of the court unsound.

The court also declared its decision in *Williams v. State*, 179 Ala. 51, to be opposed to the doctrine of *West Virginia v. Gilman*, 33 W. Va. 146.

The state of Georgia has also enacted a statute identical in principle with the Alabama statute as to receipt and possession of liquors; the Georgia law will become effective May 1st, 1916.

NORTH CAROLINA.

In March, 1915, the General Assembly of North Carolina enacted a statute, section 1 of which made it unlawful for any person whatever to deliver, in any manner or

by any means whatsoever, for hire or otherwise, in one or more packages, at one time, from a point within or without the state, to any person, firm, or corporation in the state, any spirituous or vinous liquors or intoxicating bitters in a quantity greater than one quart, or any malt liquors in a quantity greater than five gallons; and by sections 2 and 3 made it unlawful for any person, firm or corporation at one time or in one or more packages, to receive at any point within the state, for his or her use, or for the use of any person, firm or corporation, any spirituous or vinous liquors or intoxicating bitters in a quantity greater than one quart, or any malt liquors in a quantity greater than five gallons, within fifteen days.

This statute has been unanimously sustained by the Supreme Court of North Carolina in the case of *Glenn v. So. Ex. Co.*, (N. C.), 87 S. E. Rep. 136. The court in that case, after sustaining the Webb-Kenyon Law, expressly approved and followed the Alabama decision of *So. Ex. Co. v. Whittle*, supra, and quoted from the opinion, with approval, the paragraph from the Whittle case which is hereinabove set forth.

The case of *State v. Williams*, 146 N. C. 618, had been relied on as an authority against the validity of said statute, but the court declared that the question involved was not raised or decided in the *Williams case*; and thereby the Supreme Court of North Carolina removed said *Williams case* as any authority for the appellant's contention upon the present record.

The *Williams case* itself was decided by a divided court, and the Supreme Court of Mississippi in *State v. Phillips*, (Miss.), 67 South. Rep. 651, expressed a preference for the opinion of Chief Justice Clark in that case, wherein the learned Chief Justice expressed himself as follows:

"In limiting each person to a half gallon per day for his own use (for the law permits no sale) the Legislature was not niggardly. Besides, if the manufacture, though exclusively for one's own use and out of one's own apples and peaches, in the county, can be forbidden by statute without breaking the Constitution, why cannot the importation of the same article across the county line, in a greater quantity than a half gallon per day, even for one's own use, be prohibited by the same power? The truth is that, the legislature having jurisdiction of the subject, the limitations upon its exercise rest in the wisdom and sound judgment of the legislature, subject only to review by the people, not by the courts."

In *Van Winkle v. State*, (Del.), 91 Atl. 381, the Supreme Court of that state considered a statute almost identical with that involved in *State v. Williams*, 146 N. C. 618, in the following words: "That it shall be unlawful for any person to carry, bring, or have brought, any quantity of spirituous, vinous, or malt liquors from one point within the state of Delaware into local option territory within said state, greater than one gallon, within the space of twenty-four hours;" and the court held that the act did not amount to an abridgement of the privileges guaranteed to citizens by the 14th Amendment to the Federal Constitution, for the reason given in that part of the opinion by the Court of General Sessions, involving the statute, in *State v. Grier*, 88 Atl. 579. The Court of General Sessions in the case referred to wrote a careful opinion upon the subject, with the later authorities, and thoroughly demonstrated the validity of said Delaware statute.

SOUTH CAROLINA.

On February 20, 1915, the Legislature of South Carolina enacted a statute containing the following pertinent sections:

"Section 1. Be it enacted by the General Assembly of the State of South Carolina that it shall be unlawful for any person, firm, corporation, or company, to ship, transport, or convey any intoxicating liquors from a point without this state into this state, or from one point to another another in this state, for the purpose of delivery, or to deliver the same to any person, firm, corporation, or company within this state, *or for any firm, person, corporation, or company, to receive* or be in possession of any spirituous, vinous, fermented or malt liquors or beverages containing more than one per cent. of alcohol, for his, hers, its, or their own use, or for the *use of any other person, firm, or corporation, except as hereinafter provided.*

"Section 2. Any person may order and receive from any point without the state not exceeding one gallon within any calendar month, for his or her personal use, of spirituous, vinous, fermented or malt liquors or beverages.

"Section 7. Any person violating any of the provisions of this act shall be subject to a fine of not less than one hundred dollars or imprisonment for not less than three months, or both, in the discretion of the court."

This statute has not been passed on by the Supreme Court of South Carolina as yet, but we think a previous

decision of that court leads to the conclusion that the statute will be sustained as a valid police regulation, bringing into operation the Webb-Kenyon Law against liquor proposed to be shipped into South Carolina in excess of the statutory quantity.

In *Atkinson v. Southern Ex. Co.*, 94 S. C. 44, 78 S. E. 516, 48 L. R. A. (N. S.) 349, the court said that the legislature of South Carolina had the power to adopt a statute having the prospective effect of "prohibiting alcoholic liquors from being imported into this state. Such a statute would not contravene any provision of the United States Constitution. As we have already said, the recent act of Congress divests intoxicating liquors of their interstate character and invests the respective states with the power either to prohibit importation absolutely or to allow it only for sale and use through a dispensary."

IDAHO.

In *Ex parte Crane*, (Idaho), 151 Pac. Rep. 1006, there was involved the validity of a statute of Idaho making it unlawful for any person to import, ship, sell, transport, deliver, receive or have in his possession, any intoxicating liquors except as in the act provided, or to have in his possession any intoxicating liquors of any kind for any use or purpose except the same has been obtained and is so possessed under a permit authorized by the act.

It was agreed that the petitioner, Crane, had in his possession in Latah County, a prohibition district, a quantity of liquor for his own use, and not for sale or gift.

It was contended that the statute was a violation of section 1 of the 14th Amendment to the United States Constitution, that it was not a reasonable exercise of the police power of the state, and that it violated a section of

the Idaho Constitution as follows: "No person shall be deprived of life, liberty, or property, without due process of law."

After citing, among other cases, *New York ex rel Silz v. Hesterberg*, 211 U. S. 31, and quoting from *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, and from *Mugler v. Kansas*, 123 U. S. 623, the court then referred to the following cases that had been cited against the statute and which the court said "will disclose more of argument against the wisdom of such legislation as this than of reason why the aid of the courts may be invoked to defeat it:"

Ex parte Wilson, 6 Okl. Cr. 451, 119 Pac. 596.

Com. v. Campbell, 133 Ky. 50; 107 S. W. 383; 24

L. R. A. (N. S.) 172.

State v. Gilman, 33 W. Va. 146; 10 S. E. 283; 6

L. R. A. (N. S.) 847.

State v. Williams, 146 N. C. 618; 61 S. E. 61; 17

L. R. A. (N. S.) 299.

Thereupon the court expressed its conclusion as follows:

"Probably the author of none of these opinions would hesitate in holding that the sale of intoxicating liquor may be prohibited as a legitimate exercise of the police power, and that such a law would not abridge any of the privileges or immunities of the citizens in such a way as to violate any constitutional provision. Still it must be admitted, that if the possession of such liquor 'can by no possibility injure or affect the health, morals, or safety of the public,' the sale is equally harmless; for it only transfers the possession from one person to another. The fact is that the harm consists neither in the possession nor the

sale, but in the consumption of it. That is the evil which the people of Idaho, acting through the legislature, are trying to eradicate, and since 'it will not require any elucidation to show that, if the citizen may be prohibited from having liquor in his possession, he can be prohibited from drinking it, because of necessity, no one can drink that which he has not in his possession,' and since great difficulty has been encountered in enforcing the prohibitory laws, the statement made by the learned jurist in the case of *Mugler v. Kansas*, supra, relative to the manufacture of intoxicating liquors for the maker's own use, as a beverage, might well be said with respect to its possession, which would make it read:

"And so, if in the judgment of the legislature, the possession of intoxicating liquors * * * would tend to cripple, if it did not defeat the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question.'

"We have reached the conclusion that this act is not in contravention of section 1 of the Fourteenth Amendment to the Constitution of the United States, nor of section 13, article 1, of the Constitution of Idaho; that it was passed by the legislature with a view to the protection of the public health, the public morals, and the public safety; that it has a real and substantial relation to those objects; and that it is, therefore, a reasonable exercise of the police power of the state."

WEST VIRGINIA.

Counsel for appellant in their reply brief upon the former hearing contended that under constitutional government as it exists in the United States, the regulation of the personal habits of the adult citizen not under a disability is not a function of government, and that certain regulations proposed by the West Virginia amendatory statute, approved February 5, 1915, are in violation of the fundamental law as set forth in both State and Federal Constitutions; they will no doubt make the same contention against the statute of May 24th, 1915.

Among other cases, some of which we have already noticed, they cited *State v. Gilman*, 33 W. Va. 146, and contended that the decision of the highest court of West Virginia in said case prescribed a rule of construction for the Constitution of that state which should be adopted here.

The *Gilman* case was decided under a provision of the Constitution in the following words: "Laws shall be passed, regulating or prohibiting the sale of intoxicating liquors within the limits of this state." Without conceding that the decision was a correct construction of that provision of the Constitution, it must be now said that the amendment, effective July 1st, 1914, entirely changed the constitutional situation in West Virginia in respect to the subject-matter in hand.

In *State v. Sixo*, (W. Va.), 87 S. E. 267, decided November 30, 1915, the court took occasion to refer to this change and to say of the case of *State v. Gilman*, that it is authority for the proposition that a statute of the kind involved was unconstitutional and void "*under the Constitution then in force*," and further, used the following language:

"Since the case of State v. Gilman was decided the Constitution of the state has been amended. The Constitution as amended prohibits the manufacture and keeping for sale of malt, vinous and spirituous liquors, etc., and requires the legislature to 'enact such laws, with regulations, conditions, securities, and penalties as may be necessary to carry into effect the provisions of this section.' This amendment became effective July 1, 1914. It is the duty of the legislature to enact such laws as may be necessary to make effective this provision of the Constitution as amended. The legislature, responsive to this requirement of the Constitution, has deemed it wise to require liquors brought into the state, or carried from one place to another within the state, in quantities of one-half gallon or more, to be marked or labeled. Whether or not this is a wise policy is not for the courts to determine. If the legislature has not exceeded its powers, the courts cannot interfere. The courts may decide whether or not the legislature had the power to establish these regulations, but they cannot prescribe the policy if within the legislative limits; this would be to subordinate the will of the legislature to the opinion of the courts."

The court then cited the case of *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, holding that a state, in dealing with a recognized evil which it is free to suppress, might adopt measures having reasonable relation to that end, although the inhibited transaction separately considered might be innocuous. The court therefore took a much broader view of the present Constitution of West Virginia than was taken by the court in the *Gilman* case of the Constitution, before amendment

Furthermore, in *State v. Davis*, (W. Va.), 87 S. E. 262, decided November 30th, 1915, it was held that

a provision against advertising liquors, under the Yost Act, was valid under the amended Constitution of West Virginia and that section 8 of the Yost Act of 1913 did not violate the "privileges or immunities" clause of the 14th Amendment to the United States Constitution.

It must be evident, therefore, that the *Gilman case* is no longer to be deemed an authority here, in view of the much broader field for legislative action under the grant of power contained in the West Virginia Prohibitory Amendment. No doubt it was because of the narrow view taken by the West Virginia court in the *Gilman case*, that the amendment was so framed that the legislature, without delay, was commanded "to enact such laws, with regulations, conditions, securities, and penalties, as may be necessary to carry into effect the provisions of the section."

As to the decision in the *Gilman case* that the Act in question was offensive to the 14th Amendment to the Federal Constitution, we must say that the view of the West Virginia court was too narrow and hence entirely out of harmony with subsequent decisions of the Supreme Court of the United States, which will be followed now.

New York v. Hesterberg, 211 U. S. 31.

Patson v. Penn., 232 U. S. 138.

Purity Ex. & T. Co. v. Lynch, 226 U. S. 192.

Mugler v. Kansas, 123 U. S. 623.

It thus appears that three cases which have been often cited in litigation of this character, and which were relied on by appellant's counsel in their former reply brief, have been so explained and limited by the courts in which said cases arose, that appellant's counsel can no longer call them to their assistance as authorities; and the decisions which accomplished this result have all been ren-

dered since the former submission of this cause; that is to say, *Eidge v. City of Bessemer*, 164 Ala. 599, has been superseded by *Southern Ex. Co. v. Whittle*, (Ala.), 69 South. Rep. 652; *State v. Williams*, 146 N. C. 618, has been explained, limited and superseded by the case of *Glenn v. So. Ex. Co.*, (N. C.), decided December 1st, 1915; and *State v. Gilman*, 33 W. Va. 146, has been explained, limited and superseded by the cases of *State v. Sixo* and *State v. Davis*, 2895 and 2864 supra.

6. CASES FROM KENTUCKY AND OKLAHOMA REVIEWED.

KENTUCKY.

We need only refer to the Kentucky case of *Com. v. Campbell*, 133 Ky. 50, 24 L. R. A. (N. S.) 172, since the later cases from that state but follow the earlier decision. The *Campbell* case shows very plainly that it was controlled primarily by the construction which the Court of Appeals of Kentucky placed upon certain sections of the Kentucky Constitution, the court saying expressly, it could not believe that the framers of the Constitution intended to carefully take from the legislature the power to regulate the sale of liquors, and yet leave with that department of the state government, the greater power of prohibiting the possession or ownership of liquor.

The court further said that since the adoption of the then Constitution, containing a bill of rights in language which the court set forth, the guaranties to the citizen would be only empty sound, if the legislature could prohibit the citizen the right to own or drink liquor when in so doing he did not offend the laws of decency by *being intoxicated in public*, the view of the court seeming to be that a citizen of Kentucky could not enjoy the inalienable rights declared by the Constitution unless he were

permitted freely to become intoxicated *in private* and to there consume intoxicating liquors in unlimited quantities.

The decision of the Kentucky court, thus resting upon provisions of the state Constitution and upon an extremely narrow view of the police power of the state, would be a very unsafe guide to this court in construing the present Constitution of West Virginia establishing state-wide prohibition for that state, and conferring upon the legislature full power to pass all laws necessary to make the state's policy effective.

The further general remarks in the Kentucky case about the rights of man in his natural state, and the rights of society over the individual, are clearly antagonistic to the principles declared by this court in the cases of *Mugler v. Kansas*, *Crowley v. Christensen*, *Purity Extract & Tonic Co. v. Lynch*, and *Holden v. Hardy*, which have all been cited and considered.

The Kentucky court in the *Campbell* case also noted that a potent force of the Constitutional Convention of Kentucky was composed of those engaged in the business of manufacturing and selling liquors. It could not be said that the West Virginia Prohibitory Amendment was inspired or adopted by persons engaged in the liquor traffic, but rather by those totally opposed to the traffic and bent upon its utter destruction in West Virginia; the amendment conferring upon the legislature ample power to enact all laws necessary to accomplish the desired end.

OKLAHOMA.

The case of *Ex parte Wilson*, 6 Okl. Cr. 451, 119 Pac. 596, was cited but not followed in the Idaho case, *Ex parte Crane*, 151 Pac. 1006; we deem it proper, however, to briefly refer to the decision.

The case was decided December 18th, 1911, prior to the passage of the Webb-Kenyon Act.

The agreed facts were that the defendant for a long time had been engaged in the livery business in Ardmore, and that he had there in his possession on the dates alleged, a quantity of liquor shipped to him from Fort Worth, Texas, for his own use, in excess of the quantity permitted to be possessed by a citizen of Oklahoma by the statute under consideration by the court.

Under these facts, it is true that the defendant was improperly convicted, for the reasons stated in the last paragraph of the opinion based upon the case of *Vance v. Vandercook Co.*, 170 U. S. 438, which held, under the Wilson Act, that a citizen had the right to import liquors from another state, to have it delivered to him; and to keep it for his own use. This point was conclusive of the case and there was no occasion to consider the statute of Oklahoma as brought to the test of the police power under the state Constitution, or to the test of the 14th Amendment to the Federal Consitution.

In so far as the court held generally (without regard to interstate commerce) that the statute was offensive to the 14th Amendment, and to section 7 of article 2 of the State Constitution, providing that "no person shall be deprived of life, liberty or property without due process of law," the decision was out of accord with the principles referred to and the numerous authorities cited in this brief.

The opinion is composed mostly of extracts from cases which we have reviewed, and it is easy to see the court was largely influenced by the case of *Eidge v. City of Bessemer*, 164 Ala. 599, and the cases therein cited, among others, *State v. Gilman*, 33 W. Va. 146, and *State v. Williams*, 146 N. C. 618, which appear now not to have been applicable and to have been misunderstood.

In adopting the view, furthermore, of the Kentucky court, the Oklahoma court failed to take note of the difference between the status of Kentucky and Oklahoma, since the latter was a state-wide prohibition state under the Constitution and under statutes as well; whereas the Constitution of Kentucky, as construed by the Court of Appeals of that state, had left no power in the legislature to regulate the sale of liquors.

Under the doctrine declared in the *Lynch case*, 226 U. S. 192, and in *Mugler v. Kansas*, 123 U. S. 623, the Oklahoma legislature clearly had the power to enact the statute in question as a means of enforcing the state-wide prohibition law; and it was valid except in so far as it might be applied to an interstate shipment, and since the Webb-Kenyon Law, the "commerce clause" no longer prevents its complete operation.

In view of the decisions of the Supreme Court of the United States, and of later decisions in other states where the Oklahoma court mainly found the authorities upon which it relied, we confidently expect, especially since the passage of the Webb-Kenyon Law, that the court will recede from its decision in the case of *Ex parte Wilson*, supra, if another opportunity be afforded it to more fully consider the questions involved.

7. THE WEBB-KENYON LAW DOES NOT EXCLUDE FROM ITS OPERATION SHIPMENTS OF LIQUOR FOR PERSONAL USE, IF THE LIQUOR IS INTENDED TO BE RECEIVED, POSSESSED, SOLD, OR IN ANY MANNER USED CONTRARY TO THE LAWS OF THE STATE INTO WHICH THE LIQUOR IS SOUGHT TO BE INTRODUCED.

The statement above plainly follows from an examination of the terms of the Webb-Kenyon Act itself, construed in reference to the evil which the Act intended to remove. The history of the Act shows this to be true.

As Senator Knox said in his report to the Senate in reference to legislation concerning interstate commerce in liquors:

"Congressional expression in favor of personal use would be an expression upon a subject with which Congress has nothing to do, and upon it all sorts of confusing question would arise."

As the Honorable A. Y. Webb, member of Congress from North Carolina, said in the House of Representatives on February 8th, 1913, in the debate upon the Webb-Kenyon Act:

"If the states have the right, in the first place, to prohibit the personal use or receipt of liquor, this Congress has no power to take that right away from the states. On the other hand, if the state has no power under its own Constitution or the Constitution of the United States to deprive a man of the right of the personal use of liquor, then this law is harmless as to such right, because the state can never take that right from him."—Page 2807, Vol. 49, Congressional Record.

Furthermore, the record shows that Mr. Blackmon of Alabama offered an amendment, making the act inapplicable to shipments for personal use, and the amendment was defeated by the following vote: Yeas, 55; noes, 149. (p. 2865.)

Mr. Bartlett of Georgia, proposed the following amendment:

"Provided, however, that nothing in this act shall be held or construed to render illegal or subject to state control, the interstate shipment of liquors here-in defined, into any state or territory or district to any one for his personal or family use."

This was defeated by the following vote: Yeas, 65, noes, 167. (Pages 2866-67.)

Thereupon the House voted down the amendment proposed by Mr. Davis of West Virginia, as follows:

"But nothing in this act contained shall be construed to forbid the shipment or transportation of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, intended for sacramental purposes or for the personal use or consumption of the owner or consignee thereof."

Thereupon the bill passed the House: Yeas, 239; noes, 64. (Page 2867.)

This record should remove all doubt as to the purpose and intent of Congress in enacting the Webb-Kenyon Law, if indeed any possible doubt could arise. Congress intended that the prohibition of the act should exclude from the state liquors for personal use, if any state so willed, and manifested its wishes in a valid statute, falling within the terms of the act.

We will not extend this brief by any detailed analysis of several cases cited by and relied upon by appellant's counsel:

Palmer v. Express Co., (Tenn.), 115 S. W. 236.

Van Winkle v. Delaware, 91 Atl. 385.

Ex parte Peede, (Tex.), 170 S. W. 749.

Southern Express Co. v. State, (Ala.) 66 South. Rep. 115, 188 Ala. 454.

Southern Ex. Co. v. City of High Point, (N. C.), 83 S. E. 254.

Bristol Dist. Co. v. So. Ex. Co., (Court of Appeals of Virginia, decided January 12, 1915.)

In those cases the shipments which were for personal use were held not to be within the terms of the Webb-Kenyon Act, for the simple reason that there was no existing state law in the several states at that time, which would be violated by such character of shipments.

It was asserted in the brief filed by appellant on the former hearing that the Alabama court had held, in *Southern Express Co. v. State*, 66 South. Rep. 115, that no law of Alabama *could* prevent the delivery by a carrier of liquors for personal use. *This statement was a palpable error of fact.* The court did not undertake to anticipate what further legislation the state might undertake to enact in harmony with the Webb-Kenyon Act. We have seen that recently the Legislature of Alabama has enacted a further statute upon that subject, and that it has been sustained unanimously by the Supreme Court of Alabama, as applied to a shipment for personal use.

Southern Express Co. v. Whittle, (Ala.), 69 South. Rep. 652.

In *Palmer v. Express Co.* (Tenn.), 165 S. W. 236, there was no limitation by the statute under consideration upon the number of shipments that might be obtained by a citizen, although single shipments were forbidden in excess of one gallon; and the court held that the regulation as to the size of a shipment was simply one of interstate commerce, although the Mississippi court sustained a similar statute, in *American Express Co. v. Beer*, (Miss.), 56 South. Rep. 575. The difference between the Mississippi and Tennessee courts is of no consequence here, as the two *West Virginia statutes* of 1915 are framed on entirely different lines.

Furthermore, in *Palmer v. Express Co.*, (Tenn.), 165 S. W. 236, the validity of the Webb-Kenyon Act was assumed, but held inapplicable, because the shipment was for personal use and *there was no state law against receiving such a shipment*. What the Tennessee court would have held had the legislation been similar to that of West Virginia, or to that of Alabama and North Carolina, we cannot assert; suffice it to say, that up to this time the Tennessee court has rendered no decision that would militate against the soundness of the contentions embodied in this brief.

One other case cited for appellant will be noticed, and then we will conclude:

In *Hamm Brewing Co. v. C. R. I. & P. R. R.*, 215 Fed. 672, decided by District Judge Willard, it was said:

"But the Webb-Kenyon Law, while it says that the liquor must not be received, possessed, sold, or used in violation of law, does not say that it shall not be transported in violation of law. If it had been the intention of Congress to prohibit the procurement from points outside the state by a citizen of Iowa of intoxicating liquors for his own personal use, it would

have been very easy to have indicated that, by prohibiting the transportation of all interstate shipments."

In this paragraph the District Judge shows a total misconception of the meaning and purpose of the Webb-Kenyon Law. In the first place, it does not say that "the liquor must not be received, possessed, sold or used in violation of law." What it says is that all shipments of liquor are prohibited when said liquors are "intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of any law of such state." It was not intended by Congress in its enactment to prohibit the procurement from points outside the state, by a citizen of Iowa, of liquors for his own use, nor to prohibit the procurement of such liquors by citizens of other states, for personal use; what Congress intended to do, and did, was to leave the whole matter to the states under their police power, and to give effect to whatever regulations they might adopt in reference to intoxicating liquors, whether these might relate to receipt, possession, sale or use. Had Congress prohibited transportation of all interstate shipments, as the Judge thoughtlessly suggested, this would have excluded liquors from both wet and dry states—a thing no one contemplated.

The correct view of the meaning of the Webb-Kenyon Law was thus expressed by the Circuit Court of Appeals in the West Virginia case, 219 Fed. 794:

"This statute prohibits the shipment or transportation of liquor from one state into another, not only when it is intended to be sold in violation of any law of such state, but when it is to be received or possessed, or in any manner used, in violation of state law. This is a direct recognition of the right of the state to prohibit the receipt or delivery, as well as

the possession and use, of liquor, without trespassing upon the power of Congress to regulate interstate commerce."

Respectfully submitted,

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